Supreme Court, U.S.
FILED
JUN 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

86 1962

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

CATHERINE duPONT SCHLAEPPI, *et al.*,
Petitioners,

v.

DELAWARE TRUST COMPANY, *Trustee, etc.*,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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June 9, 1987

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116 pp

THE QUESTIONS PRESENTED

1. Whether the dismissal of a complaint by Delaware's highest court for failure to state a claim, filed by adopted stepchildren and asserting that they are beneficiaries of a trust established by their adoptive stepfather's aunt, which dismissal results in enforcement of an invidious discrimination against plaintiffs and excludes them as trust beneficiaries upon the sole ground of their having been adopted, constitutes state action within the meaning of the Fourteenth Amendment.

2. Whether adopted stepchildren should be considered as members of a quasi-suspect class, with the result that Delaware's common law rule with respect to proof of a settlor's intent to include such adopted stepchildren as trust beneficiaries, which is dependent entirely on the language of the dispositive instrument, will be subject to heightened scrutiny to determine whether such rule is substantially related to the achievement of the state's objective to protect the rights of owners to dispose of their property "as they see fit."

3. Whether the Delaware court, under the Fourteenth Amendment, had the power to effectuate a settlor's intent which directly violates the terms of a Delaware statute which places adopted children within the bloodline of their adoptive stepfather.

PARTIES TO THE PROCEEDING

Petitioners are Catherine duPont Schlaeppi, William Garey Schneider, Christopher Hans Schneider, Martha Ann Caroline duPont, and Henri Verge duPont, five adopted stepchildren of Henry E. I. duPont, and the natural children of Martha Verge duPont, the wife of Henry E. I. duPont, born during her former marriage.

Respondent is the Delaware Trust Company, trustee, under a trust indenture with Marion duPont Scott, deceased, as settlor, dated June 7, 1960, which trust indenture was partially amended by amendment dated June 17, 1970.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Delaware entered on March 13, 1987 (1a),[1] which affirmed the judgment of the Court of Chancery of the State of Delaware In and For New Castle County entered on September 17, 1986, on the grounds stated in the opinion of the lower court. (2a).

OPINIONS BELOW

The Delaware Supreme Court wrote no opinion, but affirmed the judgment of the Delaware Chancery Court on the grounds stated in that court's memorandum opinion which is unreported but is printed in the appendix hereto, *infra.* (3a-16a).

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1. References are to pages of the appendix to this petition printed herewith.

JURISDICTION

The judgment of the Delaware Supreme Court was entered on March 13, 1987. (1a-2a). This Court has jurisdiction to review the judgment of the Delaware Supreme Court pursuant to 28 U.S.C. §1257(3). The petition has been timely filed within the 90-day period prescribed by 28 U.S.C. §2101(c) and Rule 20.2 of this Court.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The relevant provisions of the Fourteenth Amendment and of the Delaware adoption statute (13 *Del. C.* §§919 and 920) are printed in the appendix hereto. (72a-73a).

STATEMENT OF THE CASE

A. Introductory

Petitioners ("plaintiffs") are the five adopted stepchildren of Henry E. I. duPont, and filed this complaint[2] against defendant Delaware Trust Company of Wilmington, Delaware ("Delaware Trust"), trustee under a trust indenture executed with Marion duPont Scott, deceased, as settlor. Suit was filed in the Delaware Court of Chancery in and for the County of New Castle, asserting the claim that plaintiffs are beneficiaries of the said trust established by their father's aunt, the said Marion duPont Scott, deceased ("settlor").

Delaware Trust filed a motion to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted; it also interposed a defense of *res judicata* with respect to three of the six legal theories or grounds asserted in the complaint. (33a-38a). The Delaware Chancery Court on September 17, 1986 granted

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2. References to the "complaint" are to plaintiffs' "first amended complaint". (17a-32a).

Delaware Trust's motion and dismissed the complaint. (3a-16a). Thus, the facts herein are those alleged in the complaint, as admitted[3] by Delaware Trust for purposes of its motion.

Plaintiffs appealed, and on March 13, 1987, the Supreme Court of the State of Delaware ("court below") issued an order that "the matter should be affirmed on the grounds stated in the well-reasoned opinion of the Vice Chancellor". (1a-2a).

This case involves construction of the 1960 trust indenture[4] between settlor and Delaware Trust (39a-46a) and the 1970 amendment (47a-53a), in light of the relevant provisions of the Delaware adoption statute (13 *Del. C.* §§919, 920) and of the Equal Protection and Due Process clauses of the Fourteenth Amendment.

The Delaware adoption statute (13 *Del. C.* §919(a)) makes adopted children the same as natural children *i.e.* "as if born in wedlock". The statute places the plaintiffs within the bloodline of their adoptive father, Henry E. I. duPont, and his father, William duPont, Jr. Despite 13 *Del. C.* §919(a), the court below held that the provision of the indenture defining trust beneficiaries, "Proviso (a)", although contrary to the terms of 13 *Del. C.* §919(a), was, under Delaware's common law rule ("rule") for determining the settlor's intent,[5] "clear and unambiguous" in exclu-

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3. Under Delaware law a motion to dismiss a complaint for failure to state a claim admits allegations of fact. *Spence v. Funk*, 396 A.2d 967, 968 (Del. Supreme 1978). A motion to dismiss for failure to state a claim is always "viewed with disfavor and is rarely granted". 5. Wright & Miller, Federal Practice and Procedure: Civil, §1357, p. 598 (1969). The Delaware Chancery Rules are modeled on the Federal Rules.

4. References herein to "the indenture" are to the indenture as amended.

5. Although a trust indenture is a bilateral contract different from a will, we refer *arguendo* to both a testator and a settlor as a "settlor".

sion of "adopted children" and without any consideration of the surrounding circumstances, and even though Proviso (a) does not refer to adopted *stepchildren* or contain any other explicit reference unmistakably describing the plaintiffs. Proviso (a), as construed by the court below, provides for an invidious discrimination against adopted children and excludes them as trust beneficiaries. The court thus denied plaintiffs their "day in court" to show that settlor's intent was to *include* them, adopted duPont stepchildren and family members, in the class of trust beneficiaries.

The state's judicial enforcement of the invidious discrimination against plaintiffs contained in Proviso (a), as construed by the court below, constitutes state action. Adopted stepchildren are a quasi-suspect class, and Delaware's challenged rule is subject to a heightened scrutiny. That rule bears no substantial relationship to the achievement of the state's avowed objective, and the court below had no power under the Fourteenth Amendment to carry out settlor's alleged intent which is violative of the state's own statute.

B. Descendants of William duPont, Jr.

Settlor's father, William duPont, died in 1928, leaving one son (William duPont, Jr.) and one daughter (settlor). Settlor died on September 4, 1983, at age 89, a resident of Orange County, Virginia. (20a, 55a). Settlor's brother predeceased her in 1965, leaving three sons and two daughters—settlor's five nephews and nieces. (18a). Henry E. I. duPont is settlor's oldest nephew and the adoptive father of the five plaintiffs.[6] (19a-20a). At the time of settlor's death in 1983, the descendants of William duPont, Jr. included 37 children and grandchildren of settlor's five nephews and nieces—settlor's grandnephews and grandnieces and her great grandnephews and great grandnieces. (60a-62a).

Henry E. I. duPont married Martha Verge duPont on

6. The sixth plaintiff is a infant child of an adopted stepchild.

September 25, 1967. (19a). Henry E. I. duPont then had had five children born of two previous marriages; Martha Verge duPont, his wife, had five children—plaintiffs herein—born of an earlier marriage who at the time of her marriage were all minors ranging in age from one to twelve years. Henry E. I. duPont adopted each of his five stepchildren—when minors—pursuant to the Delaware adoption statute (13 *Del. C.* §901 *et seq.* (1952)). (19a-20a). Henry E. I. duPont and Martha Verge duPont also have two children born of their marriage.

C. 13 Del. C. §919(a)

The relevant section of the Delaware adoption statute, 13 *Del. C.* §919(a) (72a) makes adopted children the same as natural children; this section places the adopted child within the bloodline of an adoptive stepfather by providing that upon the decree of adoption the adopted child becomes the child of the adoptive parent "*as if he had been born in wedlock to the adopting parent*":

> Upon the issuance of the decree of adoption, the adopted child shall be considered the child of the adopting parent or parents, entitled to the same rights and privileges and subject to the same duties and obligations *as if he had been born in wedlock to the adopting parent or parents.* (72a).[7]

D. Settlor's Trust Indenture

Settlor's indenture provides that all questions pertaining to either the *construction* or the *validity* of any provision of the indenture *shall be governed by the law of Delaware.* (45a). This provision is part of the original indenture and also is applicable to the indenture as amended.[8]

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7. Emphasis supplied to all quotations in this petition unless otherwise stated.

8. The original indenture of 1960 and the amendment thereto

The indenture provides for the payment, after settlor's death, of the trust income to parties who fall within one of the following classes: (a) grandnieces and grandnephews; (b) great grandnieces and great grandnephews; and (c) the issue of great grandnieces and great grandnephews. (49a). Proviso (a) is part of Section II, paragraph 4, which states that for "purposes of this Trust, reference to 'grandnieces and grandnephews and great grandnieces and great grandnephews' and 'issue of great grandnieces and issue of great grandnephews' *shall mean lawful blood descendants of the Grantor's brother, William duPont, Jr.*..." (52a). Two provisos follow thereafter—"Proviso (a)", and "Proviso (b)" which deals with the children of a marriage which is bigamous because of a defective divorce of one or both of the spouses, and provides that such "children shall be considered as the lawful blood descendants" of the parents. (52a). Proviso (b) has some relevance to settlor's intent, since it demonstrates respect for marriage and the children born thereof.

Proviso (a), in direct *contradiction* of the terms of 13 *Del. C* §919(a), provides that "an adopted child and such adopted child's lawful blood descendants shall *not* be considered as lawful blood descendants of the adopting parent or parents or of anyone who is an ancestor of the adopting parent".

It is established that the indenture and the amendment were written by the law firm of Potter Anderson & Corroon ("Potter firm") of Wilmington, Delaware, counsel for Delaware Trust herein. (27a). The Potter firm also represented Henry E. I. duPont in the proceedings involving the adoption of three of the plaintiffs. It is established that the Potter firm, the scrivener of the indenture, "*knew*"

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of 1970 are intended to be read as a single integrated writing: the amendment provides that the "original trust agreement, dated the 7th day of June 1960 *as hereby amended* is hereby ratified and confirmed in all respects." (53a).

of settlor's intentions to include plaintiffs as beneficiaries of her trust. (28a).

E. The Settlement Agreement

Settlor's will[9] was probated in the Circuit Court of Orange County, Virginia; it contains numerous bequests to charities, including a bequest of $10 million[10] to the National Trust for Historic Preservation for the purpose of enabling the National Trust to purchase from settlor's five nephews and nieces their interests in common in "Montpelier", a Virginia farm the title to which passed under her father's will to settlor's five nephews and nieces. Settlor's will also contained a most extraordinary *in terrorem* condition subsequent to the effect that if any of settlor's nephews or nieces did not *tranfer* his or her interest in "Montpelier" to the National Trust, the interests in settlor's trust of the "descendants" of such recalcitrant nephew or niece would be *forfeited* and such "descendants" disinherited as trust beneficiaries. Settlor's will and indenture raised a number of other significant questions, and upon the refusal of the executors of the estate and of the trustee to seek judicial instructions from the Virginia and Delaware courts, Henry E. I. duPont and John E. duPont (settlor's two oldest nephews) and the 19 natural and adopted children and grandchildren of Henry E. I. duPont brought suit on January 6, 1984 in the Virginia court seeking such judicial instructions with respect to provisions of the will. Settlor's youngest nephew and her two nieces, and their 18 children and grandchildren intervened in the Virginia action to support the defendants' position against the plaintiffs therein; Delaware Trust, as trustee, also intervened as a defendant. On January 6,

9. Settlor's will and trust indenture are interrelated, and reciprocal provisions in both instruments empowered the executors to draw upon the corpus of the trust.

10. The United States Estate Tax Return for settlor's estate showed a total gross estate of $95,154,290.

1984, plaintiffs in the Virginia action also brought an action against Delaware Trust in the Delaware Chancery Court seeking judicial instructions with respect to the indenture. In that action (Count IV, 67a-68a) plaintiffs asserted a claim that the adopted stepchildren were intended to be trust beneficiaries. The allegations make reference to the following legal grounds: (1) settlor's intent; (2) 13 *Del. C.* §919(a); (3) the provision of the indenture which makes Delaware law controlling; and (4) "the laws and public policy of the State of Delaware". (67a-68a).[11]

The Settlement Agreement contains numerous references throughout of the parties' intention to settle all issues and claims in the four Virginia and Delaware actions with the single *exception* of the adopted children claim to be trust beneficiaries. Article VI of the Settlement Agreement provides for the *preservation* of the adopted children claim to be trust beneficiaries; all parties agreed that that claim would *not* be extinguished, but would be preserved for litigation in a *new* and *separate* action in the Delaware Chancery Court. The Settlement Agreement further provides that the settlement of the adopted children claim in the Virginia action to be legatees would not prejudice plaintiffs' right to file the new action in the Delaware Chancery Court as to the indenture or have any prejudicial effect on the merits of the new action.[12] (59a-60a).

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11. Two other lawsuits were involved. First, on July 27, 1984, Henry E. I. duPont and John E. duPont filed an action in the Virginia court seeking a trial of an issue *devisavit vel non*. (56a). After the filing of this action, settlement negotiations among the numerous parties in the Virginia and Delaware litigation accelerated. A Settlement Agreement was finally executed (excerpts from which appear at 54a-66a). Second, an action was brought in the Delaware court by the children and grandchildren of Jean duPont Shehan, one of settlor's nieces, who sought to obtain for themselves the shares in the trust of the natural and adopted children of Henry E. I. duPont, on the ground of the forfeiture provision in the will. (56a-57a).

12. Article VI of the Settlement Agreement also prohibits the

The Settlement Agreement requires Delaware Trust, trustee, to escrow the six shares[13] of income to which plaintiffs would be entitled if they were declared trust beneficiaries, such escrow fund being subject to distribution to plaintiffs or to the other 31 beneficiaries depending on the outcome of this case. (60a-66a).

F. The Court Below Dismissed The Complaint For Failure To State A Claim Upon Which Relief Can Be Granted

The court below dismissed the complaint in its entirety; also mischaracterizing the six legal theories or grounds asserted herein, in the alternative, as independent "claims", the court dismissed the relevant allegations embodying those grounds. The following is a description of the legal theories or grounds as asserted in the complaint and the court's disposition of such theories.

1. Settlor's intent as a matter of law and fact

Count I alleges that: (1) under the Delaware *rule*, the indenture should be construed as showing that settlor intended to include plaintiffs as trust beneficiaries (27a, ¶34)[14]; (2) settlor intended *factually* (28a, ¶38) to include plaintiffs as trust beneficiaries, and the Potter firm, as scrivener, (27a, ¶37) "*knew* of these intentions" (28a, ¶39); and (3) settlor may have had *no* factual intent with respect

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assertion by Delaware Trust of any statute of limitations defense in the new suit. (59a).

13. The present value of these six shares is $1,279,075. (70a).

14. In support of this legal theory, the complaint refers to the terms of Proviso (b) (27a, ¶35) of the indenture and to Article Twenty-One (4) of Settlor's will (27a, ¶36). Proviso (b) treats a child of a bigamous marriage as a "lawful blood descendant" if the parents are living together as husband and wife after a marriage ceremony. (27a, ¶35). The will provision allows a "direct blood descendant" of settlor's brother be buried in settlor's private cemetery lot in Virginia and also his or her *spouse*. (27a, ¶36).

to adopted stepchildren as trust beneficiaries because of her mental and physical impairments at the time of execution of the amendment. (28a, ¶40).[15]

The court below held[16] that: (1) the legal theory based on Delaware's rule was the same[17] as the legal theories asserted in count II and would be dismissed for the same reasons (8a); (2) it did not have to reach the substantive merits of the legal theory that settlor *factually* intended to include plaintiffs as trust beneficiaries, as this legal theory was an independent *claim* and had been extinguished by the *res judicata* effect of the Settlement Agreement (9a; defense of *res judicata* applies to the "second allegation" of count I); (3) it also did not have to reach the substantive merits of the legal theory that settlor had no *factual* intent with respect to adopted duPont stepchildren as trust beneficiaries, because this legal theory was also an independent claim extinguished by the *res judicata* effect of the Settlement Agreement (9a; allegations that settlor was "incompetent" to amend her trust are barred by the *res judicata* effect of the Settlement Agreement).

2. The Controlling Effect of 13 Del. C. §919(a)

Under the indenture, 13 *Del. C.* §919(a) controls both the *construction* and *validity* of Proviso (a). Count II alleges that: (1) the indenture provides that Delaware law

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15. For years prior to her death at age 89, Settlor had been suffering from blindness, Alzheimer's disease, dementia, and cardiovascular disorders. (28a, ¶40).

16. The court below mischaracterized the three legal theories of count I, describing them as follows: (1) under 13 *Del. C.* §919(a), petitioners are "lawful blood descendants" of William duPont, Jr.; (2) as a matter of *law* settlor intended to include petitioners as trust beneficiaries; and (3) settlor lacked the capacity to *amend* the original indenture. (8a).

17. The legal theories are different. The legal theory of count I relies upon the Delaware rule. The legal theory of count II relies upon the direction in the indenture that 13 *Del. C.* §919(a) *controls* the meaning and validity of Proviso (a).

shall control the construction of Proviso (a), and thus 13 *Del. C.* §919(a) must be deemed to have been incorporated into Proviso (a), with the result that plaintiffs are deemed to have been "born in wedlock" to Henry E. I. duPont and his wife, and are thus "lawful blood descendants" of William duPont, Jr. and beneficiaries of the trust. (28a-29a, ¶43); and (2) any construction of Proviso (a) which excludes plaintiffs as trust beneficiaries would violate the terms of 13 *Del. C.* §919(a), which construction would render Proviso (a) null and void. (29a, ¶44).

Although the court held that the legal theories or grounds asserted in count II were not subject to any defense of *res judicata* (6a), it ruled that the provision of the indenture that Delaware "*law*" governs all questions of construction and validity did not refer to the terms of the statute, 13 *Del. C.* §919(a), but to "the holdings in Delaware *cases*"; that 13 *Del. C.* §919(a) "provides only a rebuttable presumption—not a mandate—that adopted children be treated the same as biological children in the construction of the provisions of trust instruments". (7a). The court held that such presumption "can be overcome by a showing that the *trust instrument itself* evinces a clear intent to exclude adopted persons". Applying this Delaware rule to Proviso (a), the court below held that settlor's "intention to exclude adopted children and the adopted children's blood descendants is, however, *clear and unambiguous* from the language of Proviso (a)". The court below held the same with regard to the legal theory that Proviso (a) is invalid under the indenture because it *violates* the terms of 13 *Del. C.* §919(a). (7a).

3. Violations of the Fourteenth Amendment

Count III of the complaint, which incorporates all of the prior allegations of the complaint (29a, ¶45), is based upon the legal ground of Fourteenth Amendment violations. Count III alleges that: (1) judicial enforcement of Proviso (a), if construed to provide for an invidious dis-

crimination against adopted stepchildren, would constitute state action under the Fourteenth Amendment (29a, ¶46); (2) the Fourteenth Amendment prevents such invidious discrimination against plaintiffs on the ground of characteristics determined solely by their birth, and such discrimination, if enforced by the court, would also impinge upon sensitive personal rights of plaintiffs and their parents[18] (30a, ¶51); (3) Henry E. I. duPont and his wife have a protected right with regard to their personal choice in rearing their children, and have chosen not to treat plaintiffs herein as "second class" family members; and, concomitantly, plaintiffs have a right to be nurtured in such a family (30a, ¶51); and (4) any judicial instruction to the trustee to treat petitioners as other than the "lawful blood descendants" of William duPont, Jr.—as provided by 13 *Del. C.* §919(a)—would violate the Fourteenth Amendment. (30a, ¶49).

The court below ruled that: (1) no state action is involved since neither the state nor any of its agents "ever controlled, advised, or were in any way involved" with the trust or the trustee, and *Barrows* v. *Jackson,* 346 U.S. 249 (1952) and *Shelley* v. *Kraemer,* 334 U.S. 1 (1948) are rejected on the ground that in those cases there was a "much greater showing" of state action; further since plaintiffs took the initiative in seeking judicial instructions Delaware's judicial approval of the discrimination does not constitute state action (11a-13a); (2) adopted children should be treated as a quasi-suspect class under the Equal Protection Clause, and the challenged state rule should be given the same scrutiny as is given to classifications based on illegitimacy (14a); (3) the state has a valid interest "in protecting the rights of property owners to dispose of their

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18. Henry E. I. duPont and his wife were originally plaintiffs, but were dropped as parties in the amended complaint after Delaware Trust's original motion to dismiss in order to eliminate one dilatory objection. (18a).

holdings *as they see fit*", and the state rule "does not necessarily discriminate against adopted persons because it does not prohibit them from being included in a trust", but "merely treats them as any other relatives—who may be favored or disinherited at the discretion of the Settlor" (15a); (4) the challenged state rule is "fair" and "reasonable"; plaintiffs have not carried their burden of "establishing the insubstantiality of the state rule; and plaintiffs "cannot prevail under any set of facts which they have [sic] alleged". (14a-15a).

G. Raising of the Federal Questions

As shown by the above statement, the federal questions were raised in plaintiffs' complaint (29a-30a), and were decided by the court below. (11a-16a).

REASONS FOR GRANTING THE WRIT

I. This Case Offers The Court An Opportunity To Hold That Adopted Children Are A Quasi-Suspect Class For Fourteenth Amendment Analysis, Thereby Subjecting The Challenged State Rule To Heightened Scrutiny

The court below dismissed the complaint for alleged failure to state a claim upon which relief can be granted; it rejected each of the six legal theories or grounds asserted in support of plaintiffs' claim, thereby depriving plaintiffs of their "day in court" to prove the allegation that settlor never intended to exclude them as trust beneficiaries. The court below construed the indenture as providing for discrimination against plaintiffs, depriving them of a significant lifetime income and a share of the corpus from the family trust, and stigmatized[19] them as "second-class" family members.

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19. Making an adopted child feel like a "second-class" family member leaves "an area of rejection which is, in many instances, more important *psychologically* than is concern over material values". *In re Smith's Estate*, 7 Utah 2d 415, 326 P.2d 400, 403 (1958).

Although Delaware's adoption statute places plaintiffs within the bloodline of their adoptive father's family, the court below construed the provision of the indenture which makes Delaware "law" controlling as referring not to the statute, 13 *Del. C.* §919(a), but to the "holdings in Delaware cases" which establish the state's rule for determining a settlor's intent. The court below enforced the invidious discrimination against adopted stepchildren which is contained in a private indenture. Ignoring the effect of 13 *Del. C.* §919(a), the court held that under Delaware's rule the enforcement of such discrimination is authorized, even without any trial and even though the indenture is not explicit or unmistakeable in a *prima facie* exclusion of *stepchildren* adoptees, because there is a reference in the indenture merely to "*an* adopted child".

The court below agreed that adopted children are a quasi-suspect class, thus making appropriate a heightened scrutiny of the Delaware rule. The court held that Delaware's rule was substantially related to achievement of the state objective of protecting the right of owners to dispose of their property "as they see fit". In so doing, the court ignored the equally valid state objective embodied in its own adoption statute—protecting the rights of adopted children—and other significant reasons why there is no substantial relationship between the state rule and the achievement of protection of owners rights to dispose of property.

This case offers the Court an opportunity to define the constitutional status of adopted children, and to establish a minimum standard under the Fourteenth Amendment, which would make meaningful, protections provided by 13 *Del. C.* §919(a) and similar statutes enacted in half of the states which also place an adopted child within the bloodline of an adoptive father. The Court's determination under the Fourteenth Amendment would be important to present and future controversies involving adopted children which

"may well be the most frequent source of litigation in the entire field of probate and trust law today".[20]

A. Enforcement By A State Of An Invidious Private Discrimination Constitutes State Action Under The Fourteenth Amendment

Delaware's utilization of its courts to enforce a private invidious discrimination constitutes state action triggering the protections of the Fourteenth Amendment. The court below erroneously rejected judicial enforcement of a private contract as a basis for state action. *Palmore* v. *Sidoti*, 104 S.Ct. 1879, 1881-2 n. 1 (1984) ("The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment.") Since *Ex Parte Virginia*, 100 U.S. 339 (1880), in "hundreds of cases" this Court has held that the judicial enforcement of private contracts providing for invidious discrimination constitutes state action under the Fourteenth Amendment. *Bell* v. *Maryland*, 378 U.S. 226, 257 (1964) (Douglas, J., dissenting). The test is not the form in which state power is applied, but—whatever the form—whether such power has in fact been exercised by the state through its judicial, legislative or executive agencies. *New York Times* v. *Sullivan*, 376 U.S. 254, 265 (1964).

The view of the court below that a challenge to a state

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20. E. C. Halbach, Jr., Issues About Issue: Some Recurrent Class Gift Problems, 48 Mo. L. Rev. 333, 335 (1983). Some 150,000 children are adopted annually, and a 1981 Congressional Committee report states that adoptees constitute approximately five percent of the population and that the relationships created by adoption affect up to one third of the population. In 1975, 63% of adoptions were *in-family* adoptions, not surprisingly in view of the rising divorce rate, and adoptions by *stepparents* accounted for 85% thereof, thereby putting stepchildren adoptions for the year 1975 alone at more than 80,000. J. E. Rein, Relatives By Blood, Adoption and Association: Who Should Get What and Why, 37 Vand. L. Rev. 711, 728 (1984).

common law rule, rather than to a state statute, does not constitute state action is totally erroneous.[21]

B. Adopted Children Should Be Declared A Quasi-Suspect Class Making Delaware's Common Law Rule Subject To Heightened Scrutiny

Adopted children have those characteristics which this Court has deemed important in establishing women and illegitimate children as quasi-suspect classes for Fourteenth Amendment analysis. Further, state enforced discrimination against adopted children impinges upon the most sensitive kinds of personal rights of spouses, parents, and children. This court should determine that adopted children also fall into a quasi-suspect class and that discriminations based upon adoption must be given heightened scrutiny.

Like the history of women and illegitimate children, the history of adoptees is a history of purposeful discrimination. Until recently adopted children were treated by society, and even by their adoptive parents, as "second class"[22] family members, an attitude which had origins in the English reverence for consanguinity. But in the past 50 years in many states, an enlightened view has developed in which the "call of the blood" can no longer serve to relegate adopted children to second-class status.[23]

Many states, either by statutes which equate adopted children to natural children or by judicial decisions which reflect the same societal value, have adopted the view that

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21. See, J. D. Barnett, What is "State" Action Under The Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution, 24 Or. L. Rev. 227 (1945).

22. The unequal treatment of adopted children is a legacy, in part, of the "placing out" system, a variation of indentured servitude. Adoptees' Equal Protection Rights, 28 UCLA L. Rev. 1314, 1335-1336 (1981).

23. *Estate of Sykes*, 477 Pa. 252, 262, 383 A.2d 920, 924 (Pa. Supreme 1978).

no decent person would discriminate against some of the children in a family on the sole ground that such children entered the family by adoption rather than birth.[24] Like the discrimination against women and illegitimate children, discrimination against adopted children is based upon a characteristic determined solely by the accident of birth, and the imposition of special disabilities upon women and illegitimates, violates the basic concepts of our system that legal burdens should bear some relationship to individual responsibility, and that no child is responsible for his birth. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972); *Frontiero* v. *Richardson*, 411 U.S. 677, 682 (1973).[25]

In *Pickett* v. *Brown*, 462 U.S. 1, 7 (1983), the Court noted that it had decided a dozen cases involving illegitimates during the prior 15 years, and had invalidated a number of classifications. The Court noted that while its consideration of classifications based on illegitimacy is not subject to the Court's most exacting scrutiny which is reserved for suspect classifications, a heightened or middle-tier[26] scrutiny is applied to quasi-suspect classifica-

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24. See, *e.g. Matter of Estate of Nicol*, 152 N.J. Super. 308, 377 A.2d 1201, 1208 (N.J. Superior A.D. 1977) ("a stranger to the adoption, motivated by high-minded principles, would be quick to accept and welcome the relationships between an adopting parent and an adopted child"); *In re Coe*, 42 N.J. 485, 201 A.2d 571, 575 (N.J. Supreme 1964) ("None of us discriminates among children of a relative or friend upon a biological basis . . . We ought not impute to others instincts contrary to our own"); *Wheeling Dollar Savings & Trust Co. v. Hanes*, 160 W.Va. 711, 237 S.E. 2d 499, 503 (W. Va. Supreme 1977) (settlors who are concerned with "medieval concepts of 'bloodline' and "heirs of the body' are to be considered "eccentrics").

25. Compare, *Craig* v. *Boren*, 429 U.S. 190, 219 (1976) where then Justice Rehnquist, dissenting, said: "Most obviously unavailable to support any kind of special scrutiny in this case, is a history or pattern of past discrimination, such as was relied on by the plurality in *Frontiero* to support its invocation of strict scrutiny".

26. See, *Craig* v. *Boren*, 429 U.S. at 210 n.* (1976) (Powell, J.

tions such as illegitimates, and that such heightened scrutiny is "not a toothless one". *Matthews* v. *Lucas,* 427 U.S. 495, 510 (1976); see also, *Mills* v. *Hableutzel,* 456 U.S. 91, 99 (1982); *United States* v. *Clark,* 445 U.S. 23, 27 (1980); and *Lalli* v. *Lalli,* 439 U.S. 259, 265 (1978).

In evaluating a challenged state rule, the Court determines what burden of justification must be met by looking to the nature of the classification and the nature of the individual interests affected. *Zablocki* v. *Redhail,* 434 U.S. 374, 383 (1978). The discrimination enforced herein by the court below impinges upon the most sensitive of personal rights. The Delaware adoption statute was designed to protect those personal relationships, and this Court has said that "the importance of the familial relationship to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist *even in the absence of blood relationship*": *Smith* v. *Organization of Foster Families For Equality and Reform,* 431 U.S. 816, 844 (1977); and the Court observed that "[a]doption, for example, is recognized as the legal equivalent of biological parenthood"; *Ibid.* at n. 51. Freeedom of choice in marriage and child-rearing is a fundamental element of liberty protected by the Fourteenth Amendment, as this Court held in *Board of Directors of Rotary International* v. *Rotary Club of Duarte,* No. 86-421 Slip Op. p. 7, May 4, 1987.

The relationships created by the adoption by a step-

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concurring) ("our decision today will be viewed by some as a 'middle-tier' approach"); and *Trimble* v. *Gordon,* 430 U.S. 762, 781 (1977) (Rehnquist, J. dissenting). See generally, Equal Protection and the "Middle-Tier": The Impact on Women and Illegitimates, 54 Notre Dame Law. 303 (1978).

father of his wife's children by a former marriage are especially sensitive; there is the relationship of husband and wife, a loving although not a "blood" relationship; there is the relationship of one adoptive parent—a loving, but not a "blood" relationship; and there is the relationship between the natural parent and the child which is a blood relationship. Out of love, and to create a unified family unit, a stepfather adopts his wife's natural children. The Delaware adoption statute takes cognizance of these special relationships. Section 919(b), of 13 *Del. C.* (72a) provides that upon adoption a *stranger* adoptee shall no longer be entitled to the rights or privileges or subject to any of the duties or obligations of a child with respect to the natural parent; but provides that when a child is adopted by a *stepparent,* the child's relationship to his natural parent who is married to the stepparent, shall not be altered by reason of the adoption. Also, Section 920(c) of 13 *Del. C.* (73a) provides that when the adopting parent is a stepparent married to a natural parent, the provisions of the section shall not affect the rights of inheritance between the child and its natural parent. The Delaware adoption statute also made settlor a statutory heir of plaintiffs, and the latter her heir. 13 *Del. C.* 920(b). (72a).

C. The State's Challenged Rule Is Not Substantially Related To The Achievement Of The Avowed State Objective

1. The challenged Delaware rule

The people of Delaware, speaking through their legislature, established special protections for adopted children, and together with half of the states,[27] Delaware placed adopted children on an equal footing with natural children.

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27. Toward Equal Treatment of Adopted Children Under Testamentary Class Gifts: Iowa's Rejection of the Stranger to the Adoption Rule in *Elliott v. Hiddleson,* 67 Iowa L. Rev. 845, 853, n. 71 (1982).

Delaware is therefore one of the states that has rejected the earlier stranger-to-the-adoption rule, under which it was presumed that a settlor would intend to *exclude* adopted children from a class gift. The court below describes the Delaware rule as a presumption of a settlor's intent to *include* adopted children in a class gift unless adopted children are excluded by "clear and unambiguous" language *in the instrument alone,* and without any consideration of evidence of the circumstances surrounding the execution of the instrument. That the court's formulation of the Delaware rule in this case is accurate is indeed open to question as shown by every other Delaware decision on the subject; further, even-handed application of the rule as formulated should not have led to rejection of the legal ground based on the state rule.

a) In the seminal case of *Bird* v. *Wilmington Society of Fine Arts,* 43 A.2d 476, 480 (Del. Supreme 1945), the court held that the language of a dispositive instrument should be interpreted *in the light of the surrounding circumstances* because it is the function of the courts "to metaphorically place themselves at the desk with the testator as at the time of execution of the will, and see with his eyes and to ascertain with his knowledge the meaning of the language used." The court also said in *Bird* that "[c]ourts still have the duty of attempting to place themselves in the position of the testator, and to ascertain his intent in using the words he did use. For this purpose Courts may, and usually do, admit certain extrinsic testimony *to ascertain if any ambiguity exists* in the language of the Will, and to determine that ambiguity". *Id.* at 484. The formulation of the state rule herein by the court below utterly rejects the use of extrinsic testimony to determine *whether* the dispositive language is "clear and unambiguous", but the court recently held to the contrary in *Dutra de Amorim v. Norment,* 460 A.2d 511, 514 (Del. Supreme 1983), saying that "the cardinal rule of law regarding construction of trust provisions is that the settlor's intent controls the

interpretation of the language. [cases omitted] That intent is determined by considering the language of the instrument, read as an entirety, *in light of the circumstances surrounding its creation.*"[28]

b) Had the court below correctly applied the challenged state rule, even as formulated by it, the court should have concluded that the reference in Proviso (a) to "lawful blood descendants" did not, without anything more explicit, establish an intent to exclude adopted children. Earlier Delaware decisions hold that references to "issue"[29] and to "bloodline relatives"[30] are not sufficiently explicit to demonstrate the exclusion of adoptees, as other state courts have held with regard to similar terms.[31]

2. The challenged Delaware rule does not further the state's objective

If the Court determines that adopted children are properly treated as a quasi-suspect class, the challenged state rule will be subject to this Court's heightened scrutiny, and to pass muster under the Fourteenth Amendment the state's challenged rule will have to be found to "serve important governmental objectives and must be substantially related to achievement of those objectives". *Craig* v. *Boren,* 429 U.S. 190, 197 (1976). The state's chal-

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28. See also, *Wilmington Trust Co. v. Coyne,* 373 A.2d 867, 869 (Del. Ch. 1977); *In re Will of Dixon,* 280 A.2d 735, 737 (Del. Ch. 1971); *Delaware Trust Co. v. McCune,* 269 A.2d 256 (Del. Ch.), *aff'd sub nom., Bank of Delaware v. Delaware Trust Co.,* 280 A.2d 534 (Del. Supreme 1971)

29. *Wilmington Trust Co. v. Haskell,* 282 A.2d 636 (Del. Ch. 1971), *aff'd,* 304 A.2d 53 (Del. Supreme 1973); *Benz v. Wilmington Trust Co.,* 333 A.2d 169 (Del. Supreme 1975).

30. *Jackson v. Riggs National Bank of Washington, D.C.,* 314 A.2d 178, 182 (Del. Supreme 1973).

31. Compare, *In re Estate of Ogden,* 353 Pa. Super. 273, 509 A.2d 1271 (Pa. Superior 1986) (and cases cited).

lenged rule clearly is not substantially related to the state objective of protecting the disposition of property by owners "as they see fit".

a) It is established herein that the settlor factually intended to include plaintiffs as trust beneficiaries. Therefore, application of the state's challenged rule has only produced a result directly *contrary* to settlor's admitted intent. That is hardly the achievement of the state objective.

Even if there were no concession herein of settlor's true intent to include plaintiffs as trust beneficiaries, the application of the state rule here denied plaintiffs any right to discovery of the circumstances surrounding settlor's execution of the indenture and their "day in court". Plaintiffs propounded numerous interrogatories to Delaware Trust on the subject of the relevant circumstances surrounding the settlor's execution of the indenture and settlor's intentions with respect to plaintiffs—facts which would have enabled the court below on summary judgment or at trial, as stated in *Bird v. Wilmington Society of Fine Arts,* to construe the words used in Proviso (a). The key to this case is obviously the evidence of the surrounding circumstances as contained in documents and testimony illuminating settlor's true intentions.

b) The Fourteenth Amendment we submit requires a more definite standard than "clear and unambiguous". But even applying that standard here, there was no showing of such intent to exclude plaintiffs. Since Proviso (a) can be construed as covering only *stranger* adoptees and not adopted stepchildren, the scrivener's reference in Proviso (a) to "*an* adopted child", without further explanation, is not any "clear and unambiguous" exclusion of adopted *stepchildren*. Nor does the phrase "*an* adopted child" cover "*all*"[32] adopted children, or refer to the trust beneficiaries

32. The failure of Proviso (a) to cover "*all*" adopted children was considered so significant by Delaware Trust that it repeatedly *misstated* the language of Proviso (a) in its brief below, asserting incorrectly throughout that Proviso (a) refers to "*all*" adopted children.

as "lawful blood descendants" *only*. If settlor's true intent had been to exclude not only *stranger* adoptees, but adopted duPont *stepchildren* as well, the Potter firm would have been obligated to make such intent *explicit and unmistakable* by naming plaintiffs or describing them with unmistakable exactitude. That the scrivener did not do so, is probative of settlor's true intent not to exclude plaintiffs?[33] The Potter firm, which represented Henry E. I. duPont as the adoptive stepfather in three of his five adoptions, may reasonably be assumed to have been comfortable with the verbiage of Proviso (a) because it knew that Proviso (a) was intended only to exclude *stranger* adoptees and therefore did not invidiously discriminate against the adopted *stepchildren* of its former client.

c) No motive is suggested for exclusion of duPont adopted stepchildren as trust beneficiaries. On this record it is established that plaintiffs were—equally with the other children in the family—the legitimate objects of settlor's donative intents.[34] Should it be assumed that settlor intended to punish the innocent plaintiffs, and exclude them from the life-time income and participation in the corpus of the trust enjoyed by their peers, on the sole ground of having been adopted, when, at the same time, settlor gave away tens of millions to charities?[35]

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33. If an attorney's client actually intends to discriminate among children in the same family—depending on whether they are natural or adopted children—the scrivener is required to address himself specifically and unambiguously to memorializing such intent. Compare, E. C. Halbach, The Rights of Adopted Children Under Class Gifts, 50 Iowa L. Rev. 971, 981 (1965).

34. The complaint alleges that settlor's will provides for burial of plaintiffs' mother in settlor's private cemetery lot, as suggestive of settlor's affection for plaintiffs' mother, equal to that of her affection for the spouses of settlor's other nephews and nieces.

35. When a testator is "willing to bestow his bounty upon an institution, it seems at least as likely that he would desire to pass his estate to his children's children, whether natural-born or adopted": *Estate of Flinn*, 388 A.2d 672, 675-6 (Pa. Supreme 1978).

d) The primary reason given by the court below to support application of the challenged state rule here undercuts the court's very determination that Proviso (a) contains "clear and unambiguous" language intended to exclude plaintiffs as trust beneficiaries. First, the court found that settlor "*may*" have intended to exclude the plaintiffs as trust beneficiaries. Second, it held that Proviso (a) "*may*" have resulted from settlor's "sense of diplomacy". (15a). Such sheer speculations certainly are no substitute for sober findings on the basis of evidence of the relevant circumstances.

e) The only policy reason proffered by the court below in support of the challenged state rule is also without foundation. The court below held that application of the state rule would prevent a nephew or niece from adopting an "*unlimited*" number of children who would become beneficiaries of the trust, and thus "spread" the assets of the trust beyond the family. (15a). This observation is totally wrong when applied to duPont family adopted *stepchildren.*[36] It has relevance only to *stranger* adoptees. The number of adopted duPont family stepchildren is presently five, and the number in the future will depend entirely upon whether a future spouse has children by a former marriage. But, we agree, the number of potential *stranger* adoptees is unlimited and theoretically includes all of the children in the world.

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36. The court's discussion clashes with its own decision in *Jackson v. Riggs National Bank of Washington, D.C.*, 314 A.2d 178, 182 (Del. Supreme 1973) where it held that the will did not demonstrate a clear and unambiguous intent to excude an adopted child. The court said that the adopted child had "in the eyes of the law, become a full and equal child" of the family; that the testator's intent was to benefit members of the family and the adopted child met that qualification.

II Under the Fourteenth Amendment The Court Lacked The Power To Enforce A Testamentary Intent In Direct Violation Of A State Statute

"The paramount rule of testamentary construction is that the intention of a testator as expressed in his will governs the distribution of his estate and that intention, once it has been ascertained, will be given effect *unless to do so* would violate some settled rule of law or would be contrary to public policy." *Myers v. Bank of Delaware,* 149 A.2d 745, 747 (Del. Supreme 1959). In *In re Will of Potter,* 275 A.2d 574, 579 (Del. Ch. 1970), the court noted that "there is no doubt but that this Court may *not instruct* the agent [for a public charitable trust] to discriminate solely on the basis of race or for any other unconstitutional or unreasonable purpose." This rule is applied throughout the states; see *e.g. In re Estate of Janney,* 446 A.2d 1265, 1266 (Pa. Supreme 1982) (it is a cardinal rule that the intention of a testator will be denied "where it is unconstitutional, unlawful or against public policy"). Speaking of 13 *Del. C.* §§919, 920, the court below has held: "the public policy of our State, reflected thereby, is that adopted children are to be considered under the law as natural children." *Jackson v. Riggs National Bank of Washington, D.C.,* 314 A.2d 178, 182 (Del. Supreme 1973).

Plaintiffs alleged that in light of 13 *Del. C.* §919(a), the state has no power to enforce the invidious discrimination which the court below found was embodied in Proviso (a). Plaintiffs asserted that 13 *Del C.* §919(a) controls the construction and validity of Proviso (a) because that is exactly what the indenture provides, and even if the indenture provision making Delaware law controlling were not present, 13 *Del. C.* §919(a) would still apply, as part of the state's positive law. The court below refused to give effect to 13 *Del. C.* §919(a), holding:

> Plaintiffs' argument, however, incorrectly states both the scope and substance of the law of this State.

> While plaintiffs focus on the language of 13 *Del. C.* §919(a), *they ignore the holdings in Delaware cases which also constitute Delaware Law.* . . . (6a-7a)

But this holding is contrary to *Haskell v. Wilmington Trust Co.*, 304 A.2d 53, 54-55 (Del. Supreme 1973) where the court below held that remainder beneficiaries are normally determined by *"the law"* in effect at the date of death of the life-tenant "because when a testator makes a devise to a class, the membership in which is ascertainable at an indefinite future time, he is regarded as having contemplated the change *in the controlling laws* prior to that time and, hence, is presumed in the absence of any contrary context in the will, to have intended that *the statutes in effect* at the time the gift becomes operative be resorted to in determining membership in the class." See also, *Jackson v. Riggs National Bank of Washington, D.C.*, 314 A.2d 178, 182 (Del. Supreme 1973) ("The *'future law'* here involved is 13 Del. C. §919 and 920 (1952)").

The court below found the relevant state objective here as "protecting the right of property owners to dispose of their holdings *as they see fit.*" (15a). A state certainly has a valid interest in the orderly disposition of property at death, but a state's power in this respect is not unlimited. When a challenged state classification involves a substantial state interest, this Court's deference is appropriate, "but there is a point beyond which such deference cannot justify discrimination", and "state statutes involving the disposition of property at death are not immunized from equal protection scrutiny." *Trimble* v. *Gordon*, 430 U.S. 762, 767 n. 12. (1977).

Further, Delaware has an equal—and perhaps even more important—state objective of protecting adopted children. 13 *Del. C.* §919(a). Plaintiffs invoke this second and competing state objective. As the court below observed, plaintiffs "argue that the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution requires this Court to conform to the Legislative mandate of 13 *Del. C.*

§919(a) and thus requires that Proviso (a) be invalidated". (16a).

The Fourteenth Amendment required the court below to give 13 *Del. C.* §919(a) its full effect, thus placing plaintiff adoptees within their stepfather's bloodline. Plaintiffs should have been considered by the court below as the "lawful blood descendants" of William duPont, Jr., and Proviso (a) should have been invalidated, as construed, as violative of Delaware's positive law. The refusal of the court below to apply the statute violated the Due Process Clause, and the state has thus enforced an invidious and unlawful discrimination. Compare, *Beck* v. *Washington,* 369 U.S. 541, 554-555 (1962) (constitutional violation is not merely state court error).

Although not discussed by the court below, we point out that the violation of the Fourteenth Amendment is not justified by 13 *Del. C.* §920(c). (73a). This section provides that "nothing contained in this section shall limit in any way the *right* of any person to provide for the disposition of his or her property by will". In light of the limiting references to "this section", and to a "will", it is arguable whether this section refers to a trust indenture. However, assuming *arguendo* that 13 *Del. C.* §920(a) covers Proviso (a), we point out that nothing in 13 *Del. C.* §920(c) authorizes a Delaware court to enforce an *unlawful* indenture provision *i.e.* one which directly violates the terms of 13 *Del. C.* §919(a).

In light of 13 *Del. C.* §919(a), which places plaintiffs within the bloodline of their adoptive father, settlor had no power to disinherit an adopted duPont stepchild *solely upon the ground that such child is adopted.* That settlor could disinherit such adopted stepchild on *any grounds other than the fact that the child was* adopted, is another matter, since there is no such provision in the indenture.

III. The Rulings of the Court Below On The Res Judicata Defense Do Not Constitute An Independent And Adequate Non-Federal Ground

The *res judicata* ruling of the court below is not an independent non-federal ground; it affects only two of the six legal theories. The ruling is thus not broad enough in itself to sustain the judgment dismissing the complaint. See, *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985); and *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917).

Further, the *res judicata* ruling is without foundation. It is based upon treating a *claim* as the equivalent of the *legal theories* or *grounds* which might be asserted in support of the claim. The requirement of Delaware Chancery Rule 8(a)(1) (and of Federal Rule 8(a)(2)) is simply a "short and plain statement of the claim showing that the pleader is entitled to relief". See, *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957). 2A Moore's Federal Practice, ¶8.13 p. 862 (2nd ed. 1986). The Federal Rules of Civil Procedure have done away with the narrow "theory of the pleadings doctrine", under which a pleader was formerly *required* to state one definite legal theory of his case, on which he had to win or fail. 2A Moore's Federal Practice, ¶8.14 pp. 8-84, 8-85 (2nd ed. 1986). The modern approach to claim preclusion under the doctrine of *res judicata* is based on a *transactional* definition of a claim, as expounded in the Restatement Second of Judgments, §24 (1982),[37] under which a single transaction ordinarily gives rise to but one claim, even though there may be a number of substantive legal theories or grounds asserted. Restatement Second of Judgments, §24 (1982), Comment (c) states:

> That a number of different legal theories casting liability on an actor may apply to a given episode *does not create multiple transactions and hence multiple*

37. See, Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, §§4406-4408 (1981).

> *claims*. This remains true although the several legal theories depend on shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief. . . .

This Court accepts the Restatement analysis; see, *Nevada* v. *United States*, 463 U.S. 110, 130-131, n. 12 (1983); as do the Delaware courts, *Maldonado v. Flynn*, 417 A.2d 378, 381 (Del. Ch. 1980).

In this case however, the court below took the result-oriented view that the adopted children claim was coextensive with *one* of the legal theories asserted in the original Delaware litigation (that settlor intended that 13 *Del. C.* §919(a) to control Proviso (a)), and held that only that legal theory—considered by it to constitute the adopted children *claim* had been preserved by the carefully-drawn terms of the Settlement Agreement. But the adopted children claim to be trust beneficiaries "embodied" in the original Delaware action and supported by the several theories asserted therein, was preserved. That claim, and any relevant legal theory which was—or might be—espoused in support of the claim in the new action was preserved and not extinguished by the Settlement Agreement. The court below erred in holding that the legal theories asserted in the complaint herein are in actuality, independent *claims*, and that two of such "claims" and *arguendo* a third had been extinguished by the *res judicata* effect of the Settlement Agreement.

It is fundamental that if a claim is *extinguished* by operation of law or agreement, then the *res judicata* defense applies to the assertion of the same claim in a second suit even if supported by *new* substantive legal theories or grounds. But when a claim is not extinguished as here, and by agreement expressly *preserved* for assertion in a second suit, any relevant substantive legal ground or theory may be asserted in support of such preserved claim.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 9, 1987

APPENDIX

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IN THE
SUPREME COURT OF THE STATE OF DELAWARE

CATHERINE DUPONT SCHLAEPPI, WILLIAM GAREY SCHNEIDER, CHRISTOPHER HANS SCHNEIDER, MARTHA ANN CAROLINE DUPONT, and HENRI VERGE DUPONT, CHILDREN OF HENRY E. I. DUPONT AND MARTHA VERGE DUPONT, AND ELIZABETH AINSLEY SCHLAEPPI, A CHILD OF CATHERINE DUPONT SCHLAEPPI,	)	No. 327, 1986 Court Below: Court of Chancery of the State of Delaware in and for New Castle County C.A. No. 7898
Plaintiffs Below, Appellants,	)	
v.	)	
DELAWARE TRUST COMPANY, TRUSTEE UNDER A TRUST INDENTURE WITH MARION DUPONT SCOTT, DECEASED, DATED JUNE 7, 1960, AND AMENDED ON JUNE 17, 1960,	)	
Defendant Below, Appellee.	)	

Submitted: March 10, 1987
Decided: March 13, 1987

Before MOORE, WALSH and HOLLAND, Justices.

ORDER

This 13th day of March, 1987, the Court having considered the briefs and arguments of the parties, and having concluded that the matter should be affirmed on the

grounds stated in the well-reasoned opinion of the Vice Chancellor;

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery be, and the same hereby is,

AFFIRMED.

BY THE COURT:

/s/ G. T. MOORE II
Justice

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CATHERINE duPONT SCHLAEPPI, WILLIAM GAREY SCHNEIDER, CHRISTOPHER HANS SCHNEIDER, MARTHA ANN CAROLINE duPONT, and HENRI VERGE duPONT, children of Henry E. I. duPont and Martha Verge duPont, and ELIZABETH AINSLEY SCHLAEPPI, a child of Catherine duPont Schlaeppi,	)	Civil Action No. 7898
Plaintiffs,	)	
v.	)	
DELAWARE TRUST COMPANY, Trustee under a Trust Indenture with Marion duPont Scott, Deceased, dated June 7, 1960, and amended on June 17, 1960,	)	
Defendant.	)	

MEMORANDUM (Unreported) OPINION

Submitted: April 11, 1986
Decided: September 17, 1986

ON DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT: GRANTED.

John C. Phillips, Jr., Esquire, PHILLIPS & SNYDER, P.A., Wilmington, DE 19899, and Morris L. Weisberg, Esquire, BLANK, ROME, COMISKY & McCAULEY, Philadelphia, PA 19103, Attorneys for plaintiffs

Blaine T. Phillips, Esquire, and Daniel F. Lindley, Esquire, POTTER, ANDERSON & CORROON, Wilmington, DE 19899, Attorneys for defendant-trustee

HARTNETT, Vice Chancellor

This is the latest, and hopefully final, legal proceeding arising out of an *inter vivos* Trust created by Mrs. Marion duPont Scott in 1960—long before she died in 1983. Plaintiffs are descendants by adoption of William duPont, Jr., the brother of Mrs. Scott. As such they are a grandnephew, grandniece or great grandniece by adoption of the deceased. They are not, however, blood relatives of Mrs. Scott. They brought this action seeking to be included as beneficiaries under the Trust. The defendant, Delaware Trust Company, the trustee, moved to dismiss the amended complaint. I find that the motion must be granted.

I

The essential facts are not disputed. The late Mrs. Scott executed the Trust in 1960 and amended it in 1970. A second amendment was executed in 1976 but it is not relevant to the present controversy. Section II (4) (hereinafter referred to as "Proviso (a)") of the Amended Trust Indenture provides, in part:

> "For the purposes of this Trust reference to 'grandnieces and grandnephews and great grandnieces and great grandnephews' and 'issue of great grandnieces and issue of great grandnephews' *shall mean lawful blood descendants* of the Grantor's brother, William duPont, Jr., provided always, however, that:
>
> (a) *An adopted child* and such adopted child's lawful blood descendants *shall not be considered as lawful blood descendants* of the adopting parent or parents or of anyone who is an ancestor of the adopting parent." (Emphasis added.)

This language on its face clearly and unambiguously

precludes plaintiffs from taking under the Trust. Plaintiffs, however, assert numerous claims that the language does not preclude them from benefitting from the Trust.

Mrs. Scott died on September 4, 1983 and soon thereafter actions concerning the Trust and her Will were filed in this Court: *DuPont, et al. v. Delaware Trust Co.*, Del. Ch., Civil Action No. 7421-NC; and in the Circuit Court of Orange County, Virginia: *DuPont, et al. v. Shackelford, et al.*, Chancery E 84-1. These cases, and a related action, *McConnell v. Delaware Trust Co.*, Del. Ch., Civil Action No. 7673-NC, were ultimately resolved pursuant to a Settlement Agreement executed by all the parties to the suits on October 15, 1984 and approved by this Court and the Virginia Court later that same month. All the present plaintiffs joined in the Settlement Agreement.

The Settlement Agreement, however, did not dispose of all the disputes over the Scott Trust. Paragraph VI(B) of the Settlement Agreement permitted the present plaintiffs to file "a new and separate suit in the Delaware Court raising the adopted children issue". The "adopted children issue" is defined in Paragraph VI(A) of the Settlement Agreement as "the claim embodied in Count IV" of the Complaint filed in *DuPont, et al. v. Delaware Trust Co.*, Del. Ch., Civil Action No. 7421-NC, the original Delaware action.

On December 28, 1984, plaintiffs filed this present lawsuit. Their First Amended Complaint alleged that the late Mrs. Scott intended to include plaintiffs as beneficiaries under her Trust (Count I), that Mrs. Scott intended 13 *Del. C.* §919(a) to govern the Trust, and thereby intended that plaintiffs be deemed to be lawful blood descendants of William duPont, Jr. (Count II), and that the Fourteenth Amendment to the United States Constitution bars this Court from ruling that plaintiffs are not beneficiaries under the Trust solely because of their adopted status (Count III). The Trustee responded by urging that plaintiffs bargained away their First and Third Count claims in the prior Settlement Agreement and that the remaining allegations (the Second

Count of the Complaint) fail to state claims upon which relief can be granted.

II

I will first consider the argument as to Count II of the First Amended Complaint. The Trustee concedes that Count II may be maintained in this Court; however it argues that it fails to allege a claim upon which relief can be granted. The allegations of Count II, read in the light most favorable to plaintiffs, challenge, under two distinct theories, Proviso (a) of the Amended Trust.

Plaintiffs claim that Proviso (a) is invalid because it is contrary to the provisions of 13 *Del. C.* §919(a). That statute is part of Subchapter I, Chapter 9, title 13 *Delaware Code* which is the statute which provides for and regulates the adoption of children in Delaware. It states:

> "(a) Upon the issuance of the decree of adoption, the adopted child shall be considered the child of the adopting parent or parents, entitled to the same rights and privileges and subject to the same duties and obligations as if he had been born in wedlock to the adopting parent or parents."

Count II also apparently alludes to an argument—made more explicitly in Count IV of the First Amended Complaint in the original Delaware action—that 13 *Del. C.* §919(a) supersedes Proviso (a). Plaintiffs claim that 13 *Del. C.* §919(a) is incorporated by reference into the Trust by Section IV(2) of the Amended Trust which states that Delaware law is to control all questions of the Trust's construction or validity. Plaintiffs argue that the provisions of 13 *Del. C.* §919(a) are inconsistent with Proviso (a), and therefore plaintiffs conclude that Section IV(2) of the Amended Trust (and by implication 13 *Del. C.* §919[a]) should prevail over Proviso (a), thereby allowing them to take as beneficiaries under the Trust.

Plaintiffs' argument, however, incorrectly states both the

scope and the substance of the law of this State. While plaintiffs focus on the language of 13 *Del. C.* §919(a), they ignore the holdings in Delaware cases which also constitute Delaware Law. These Delaware cases clearly hold that 13 *Del. C.* §919(a) provides only a rebuttable presumption—not a mandate—that adopted children be treated the same as biological children in the construction of the provisions of trust instruments. *Wilmington Trust Co. v. Huber,* Del. Ch., 311 A.2d 892 (1973), *aff'd sub. nom., Benz v. Wilmington Trust Co.,* Del. Supr., 333 A.2d 169 (1975). This presumption can be overcome by a showing that the trust instrument itself evinces a clear intent to exclude adopted persons. See *Benz v. Wilmington trust,* supra, 333 A.2d at 170. See also, *Jackson v. Riggs Nat'l. Bank of Washington, D.C.,* Del. Supr., 314 A.2d 178 (1973); *Haskell v. Wilmington Trust Co.,* Del. Supr., 304 A.2d 53 (1973); *Wilmington Trust Co. v. Chichester,* Del. Ch., 369 A.2d 701 (1976), *aff'd.,* Del. Supr., 377 A.2d 11 at 14 (1977) ("adult adopted persons are permitted to take through their adoptive parents *where the pertinent instruments evince no intent to the contrary*"). (Emphasis added.)

Delaware law therefore does not prohibit settlors from excluding adopted persons from their trusts as plaintiffs assert; rather, Delaware law simply presumes that settlors do not intend such exclusions absent clear directions to the contrary. Mrs. Scott's intention to exclude adopted children and the adopted children's blood descendants is, however, clear and unambiguous from the language of Proviso (a).

Plaintiffs also err in asserting that Proviso (a) of the Trust violates Delaware Law and is therefore void. Proviso (a) meets the requirements under Delaware law necessary to exclude adopted persons from a trust and, while such exclusions are not favored in this State, they are permitted. I conclude, therefore, that Count II of the First Amended Complaint fails to state a claim upon which relief can be granted and must be dismissed.

III

Next to be considered is the Trustee's attack on Count I of

the First Amended Complaint. Giving plaintiffs the benefit of any reasonable inferences, I find that three distinct claims are set forth in Count I: (1) that plaintiffs are, under Delaware law, the lawful blood descendants of William duPont, Jr.; (2) that, as a matter of law, the late Mrs. Scott intended to include plaintiffs as beneficiaries under the Trust; and (3) that Mrs. Scott lacked the capacity to amend the Trust for many years prior to her death in 1983.

The first allegation of Count I—that under Delaware law plaintiffs must be treated as the lawful blood descendants of their adopting parents—is merely the same argument made in connection with Count II of the First Amended Complaint. Suffice to say that, because the first allegation of Count I merely mirrors Count II, it must be similarly dismissed for failure to state a claim upon which relief can be granted.

IV

The Trustee asserts that the doctrine of *res judicata* bars the second and third allegations of Count I of the Amended Complaint. In support of its position it refers to Section I (B) of the Settlement Agreement adopted by the decrees of this Court and the Virginia Court, which stated that it resolved:

> "... fully and finally any and all claims, cross-claims, demands and causes of action of any nature, either asserted or which could have been asserted in the [prior litigation], or arising in connection with or related to Decedent's Will, the administration of the Estate, the Indenture, the administration of the Trust, [or] the execution of this Agreement ... except for the adopted children issue in the Delaware Action, as provided in Article VI hereof, and any issues of expenses ..."

A settlement which is approved by a court has the same *res judicata* effect as a final judgment on the merits. *Ezzes v. Ackerman,* Del. Supr., 234 A.2d 444 (1967); *Maldonado v. Flynn,* Del. Ch., 417 A.2d 378 (1980). The doctrine of *res judicata* is available as a defense:

> "... if the pleadings framing the issues in the first action would have permitted the raising of the issue sought to be raised in the second action, and if the facts were known, or could have been known to the plaintiff in the second action at the time of the first action ..." (Citation omitted.)

Ezzes v. Ackerman, supra, 234 A.2d at 445-446.

The defense of *res judicata,* therefore, clearly applies to the second and third allegations of Count I. In the second allegation of Count I plaintiffs refer to Section II (4)(b) of the Amended Trust and quote language from Mrs. Scott's Will and then claim that the instruments show that Mrs. Scott intended to include plaintiffs as beneficiaries under the Trust. Leaving aside the merits of such an allegation (novel as it may seem), it is clear that this claim could have been raised in the original Delaware action. Moreover, because the claims in this present suit are based entirely on the language of the Trust and Mrs. Scott's Will, both of which were attached as exhibits to the First Amended Complaint in the original Delaware action, plaintiffs cannot claim that they now raise new facts which could not have been known at the time of the first action.

Likewise, the allegations that Mrs. Scott was incompetent to amend her Trust is now barred by the *res judicata* effect of the Settlement Agreement. This claim not only could have been raised in the original Delaware action, but it was. Count II of the First Amended Complaint in Del. Ch., Civil Action No. 7421-N.C. alleged that Mrs. Scott lacked the capacity to reform her Trust in 1976 or years before her death in 1983. Thus, assuming *arguendo* that this allegation states a cognizable claim, although it does not assert that the settlor was incompetent in 1970 when the dispositive amendment to the Indenture was executed, it is also barred by the doctrine of *res judicata* because it was a claim raised in the prior suit and compromised by the settlement.

Plaintiffs, however, contend that the second and third allegations of Count I cannot be barred by the doctrine of *res*

judicata because these allegations were specifically exempted from the settlement decrees in the prior actions. The language of the Settlement Agreement expressly preserves "the adopted children issue" for further litigation in "a new and separate action". This exemption, however, cannot be given the expansive definition urged by plaintiffs because the Settlement Agreement expressly limits the adopted children issue to "the claim embodied in Count IV" of the Complaint in Del. Ch., Civil Action No. 7421-N.C. The substance of that claim stated:

> "Section IV(2) of the Trust Indenture of Marion duPont Scott provides that all questions pertaining to the construction or validity of the Trust Indenture shall be governed by the law of the State of Delaware. The law of Delaware as to adopted children, embodied in 13 *Del. C.* §919 and 920 ... was thus made controlling by Marion duPont Scott ... and the laws and public policy of the State of Delaware prevail over any contrary provision in the Trust Indenture of Marion duPont Scott."

The only viable defense to the *res judicata* defense posed at this juncture, therefore, is whether the second and third allegations of Count I in this present case can fit within the claims embodied in the above language.

Plaintiffs maintain that Count IV of the original Delaware action fairly raised the issue of whether Mrs. Scott really intended to exclude them from her Trust. They also argue that the second and third allegations of Count I of the present suit raise questions concerning the settlor's intent and thus are similar enough to Count IV of the original suit to survive the settlement of the earlier lawsuits. I disagree.

Although the second and third allegations of Count I of the First Amended Complaint in the present case can be facially harmonized with the allegations in Count IV of the Complaint in the original Delaware action, three separate claims are actually alleged, each of which is predicated on radically different theories. The second allegation of Count I

of the Complaint presently before the Court is premised on the alleged inconsistency of Section II(4)(b) of the Trust, certain language of the settlor's Will, and Proviso (a), whereas the third allegation of this Count focuses on the mental state of Mrs. Scott. Conversely Count IV of the Complaint in the original Delaware action alleged that Proviso (a) could not be reconciled with Section IV(2) of the Indenture and 13 *Del. C.* §§919 and 920. I, therefore, conclude that the second and third allegations of Count I of the Complaint presently before the Court do not spring from the claim which was preserved by the Settlement Agreement and therefore Count I must be dismissed because it was compromised in the prior litigation.

V

Assuming, arguendo, that the doctrine of *res judicata* does not bar any of the plaintiffs' claims which are based on the Fourteenth Amendment to the U.S. Constitution, it is clear, nonetheless, that Count III of the First Amended Complaint does not make a sufficient allegation of state action to fall within the protection of the Fourteenth Amendment and therefore must be dismissed for failure to state a cause of action upon which relief can be granted. The Fourteenth Amendment protects individuals only against the acts of States. U.S. Const. amend. XIV §1; *e.g., Rendall-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). In *In re Will of Potter*, Del. Ch., 275 A.2d 574, 580 (1970), this Court recognized that "the Fourteenth Amendment does not apply to purely private trusts."

In determining whether there is sufficient state action to bring a matter within the ambit of the provisions of the Fourteenth Amendment, courts must look to the facts and circumstances of each case. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). In the present case the First Amended Complaint, even when cast in the light most favorable to plaintiffs, does not even suggest that the State of Delaware or any of its agents ever controlled, advised, or were in any way involved with either

the Scott Trust or Will or the defendant-trustee before these suits were brought.

Plaintiffs argue, however, that if this Court finds that the defendant-trustee must exclude them from the Scott Trust solely because of their adopted status, such a finding alone would constitute sufficient state action to invoke the provisions of the Fourteenth Amendment. Plaintiffs therefore, in effect, contend that this Court has no choice but to invalidate Proviso (a). In support of this position plaintiffs cite, *inter alia, Barrows v. Jackson,* 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1952); *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *State v. Brown,* Del. Supr., 195 A.2d 379 (1963); and *Bank of Delaware v. Buckson,* Del. Ch., 255 A.2d 710 (1969).

In each of these cases, however, there was a much greater showing of state action than can be inferred from plaintiffs' allegations in their First Amended Complaint. All of the cases cited by plaintiffs involved racial discrimination which is especially suspect. In order to find State action, courts generally require a more compelling showing of state involvement where discrimination on some grounds other than race is alleged. Annot., 42 A.L.R.2d 463, at 471 (1979 & Supp. 1985).

Even where racial discrimination was claimed, and this Court found that it could neither enforce nor instruct a trustee to honor a racially discriminatory clause in a trust instrument, the Court was not content to hold that such an instruction alone was state action within the meaning of the Fourteenth Amendment. In *Milford Trust Co. v. Stabler,* Del. Ch., 301 A.2d 534 at 537 (1973); *Will of Potter,* supra, 255 A.2d at 582-583; and in *Bank of Delaware v. Buckson,* supra, 255 A.2d at 714-715, this Court relied on facts independent of its own role in order to find State action. No such facts have even been alleged here.

Also, the present case comes to this Court on a much different footing than in the federal cases cited by plaintiffs. In *Barrows v. Jackson,* supra, 73 S.Ct. 1031 and *Shelley v.*

Kraemer, supra, 68 S.Ct. 836, the parties to a racial restrictive land covenant brought actions at law and in equity to enforce the agreements when some of their co-convenantors sold parcels to blacks. Similarly, in *State v. Brown,* supra, 195 A.2d 379, a merchant initiated the prosecution of an action for criminal trespass against a black who refused to leave his store after being denied service. Thus, in the federal cases cited by plaintiffs a court was called upon to enforce a policy of racial discrimination. In the words of the United States Supreme Court, "These are not cases ... in which the States have merely abstained from action, leaving private individuals free to impose such discrimination as they see fit." *Shelley v. Kraemer,* supra, 68 S.Ct. at 845.

The allegations of plaintiffs, however, are quite different. It is the plaintiffs who are seeking to have this Court rewrite the Indenture to include them as beneficiaries. This the Court cannot do as the Trust is purely a private matter. See *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) which held that a State is not responsible for the initiatives of a private party even where the State approves or acquiesces in those initiatives and 15 AM.JUR.2d, *Civil Rights* §10.

Because I have concluded that plaintiffs have provided no discernable basis for a finding of state action, Count III of the Amended Complaint must be dismissed for failure to state a claim upon which relief can be granted.

VI

Even if I were somehow able to gleen some state action from the allegations of Count III, I would still have to dismiss this Count on the alternative ground that it still fails to state a proper claim for relief under the Equal Protection Clause of the Fourteenth Amendment. When legislation is challenged as being contrary to the Equal Protection Clause, courts apply greater scrutiny to those statutes which either impair a right protected by the Constitution or affect a suspect class. *Cleburne v. Cleburne Living Center,* 473 U.S. ____, 105 S.Ct.

3249, 87 L.Ed.2d 313, at 320 (1985). Although the challenge here is not to a legislative act but to a judicial rule, I will, *arguendo,* ignore the difference.

There is clearly no constitutional right at stake. Plaintiffs do not, and cannot, claim that they have any choate interest in the *res* of the Scott Trust or a right to be named as beneficiaries. Instead, plaintiffs assert that their exclusion from the Trust must be strictly scrutinized because they, as adopted persons, are members of a suspect class.

Plaintiffs failed to cite, however, any case holding that adopted persons constitute a suspect class under the Equal Protection Clause. The United States Supreme Court has held that statutory classifications based on race, alienage and national origin warrant its strictest scrutiny. *Cleburne Living Center,* supra, 105 S.Ct. at 3255. It has, however, declined to afford the same high level of scrutiny to illegitimate children. *Matthews v. Lucas,* 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976). The Court in *Matthews v. Lucas* reasoned that, although arbitrary discrimination against the illegitimate was impermissible, not all distinctions based on legitimacy were inherently untenable. *Matthews,* 96 S.Ct. at 2762. In addition, the Supreme Court found that "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes" (citation omitted). *Id.*

Everything the Supreme Court said of illegitimates, by analogy, also is applicable to adopted persons. Accordingly, I find that the challenged rule of law here should be given the same scrutiny as is normally attributed to statutes which make distinctions on the basis of legitimacy. Under this level of review, the party challenging the classification bears the burden of establishing its insubstantiality. *Matthews v. Lucas,* supra, 96 S.Ct. at 2764.

Given the above standard of review and finding the manifest reasonableness of the challenged Delaware rule of law, it is clear that plaintiffs could not prevail under any set of facts which they have alleged. In adopting the rule of law that

a testator may disinherit adopted children, if he desires, the courts of Delaware have merely held that the State has an interest in protecting the rights of property owners to dispose of their holdings as they see fit. This rule does not necessarily discriminate against adopted persons because it does not prohibit them from being included in a trust. It merely treats them as any other relatives—who may be favored or disinherited at the discretion of the Settlor.

Another reason that the rule of law in this State is not unfair is that it prevents a testator's intent from being subverted by technicalities. Mrs. Scott's Trust Indenture evinces an intent to use the trust assets to benefit the blood descendants of William duPont, Jr., the settlor's brother. Without Proviso (a) in place, however, an actual descendant of William duPont, Jr. could adopt an unlimited number of persons—all of whom might then become beneficiaries of the Scott Trust. Thus the assets of the Trust would be spread far beyond the limits intended by the late Mrs. Scott.

In addition, the late Mrs. Scott may have executed Proviso (a) with the intention of specifically excluding the plaintiffs. Despite plaintiffs' arguments to the contrary, there is no reason why a settlor should have to identify by name the adopted persons she wanted to exclude from her Trust—indeed, a sense of diplomacy may have led Mrs. Scott to couch Proviso (a) in its present terms or she may have suspected that other children might be adopted after the Trust was executed. In any event, it was for Mrs. Scott to decide who would be the beneficiaries of her Trust. *Will of Potter,* supra, 275 A.2d at 582. And the State is justified in preserving her right to select the objects of her bounty.

Count III of plaintiffs' First Amended Complaint fails to allege any grounds under which I could find that the challenged rule is insubstantially related to a valid State interest. Plaintiffs cannot, on their allegations, carry their burden under *Matthews v. Lucas,* supra. Count III therefore must be dismissed along with the rest of the First Amended Complaint.

VII

I also note that plaintiffs' briefs have set forth a hodgepodge of facts and other arguments. Plaintiffs seem to claim that the fact that they were not strangers to Mrs. Scott's family before their adoption is somehow important. Because plaintiffs have not claimed that, but for their adoption, they would be beneficiaries under the Scott Trust, I disagree. Plaintiffs also argue that the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution requires this Court to conform to the Legislative mandate of 13 *Del. C.* §919(a) and thus requires that Proviso (a) be invalidated. I have decided, however, that Proviso (a) is consistent with Delaware Law—including §919(a)—and it is pointless to discuss this argument any further.

Finally, plaintiffs contested defendant's *res judicata* defense with a curious mix of assertions apparently to the effect that: under the Chancery Rules they should be allowed to freely amend the claims which were not prejudiced by the Settlement Agreement; that the Trustee has somehow distorted the distinctions between claims and allegations; and that the Trustee's position depends on the obsolete "Theory of the Pleadings". Suffice it to say that my holdings that the claims raised by plaintiffs are barred by *res judicata* are not based on procedural rules or semantics or arcane theories of jurisprudence. Rather, I have barred the claim pursuant to the clear language of the Settlement Agreement which was primarily drafted by plaintiffs' counsel and which both sides agreed to only after protracted arm's-length negotiations. Whatever plaintiffs may now think about the effect of the Settlement Agreement, it is clear that they have gotten what they bargained for. Accordingly, the First Amended Complaint must be dismissed in its entirety.

IT IS SO ORDERED.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CATHERINE duPONT SCHLAEPPI, WILLIAM GAREY SCHNEIDER, CHRISTOPHER HANS SCHNEIDER, MARTHA ANN CAROLINE duPONT, and HENRI VERGE duPONT, children of Henry E. I. duPont and Martha Verge duPont, and ELIZABETH AINSLEY SCHLAEPPI, a child of Catherine duPont Schlaeppi,	)	Civil Action No. 7898
Plaintiffs,	)	
v.	)	
DELAWARE TRUST COMPANY, Trustee under a Trust Indenture with Marion duPont Scott, Deceased, dated June 7, 1960, and amended on June 17, 1960,	)	
Defendant.	)	

FIRST AMENDED COMPLAINT

Plaintiffs Catherine duPont Schlaeppi, William Garey Schneider, Christopher Hans Schneider, Martha Ann Caroline duPont, and Henri Verge duPont, children of Henry E. I. duPont and Martha Verge duPont, his wife, and a minor child of plaintiff Catherine duPont Schlaeppi, bring this action against Delaware Trust Company, Trustee under a Trust Indenture with Marion duPont Scott, Deceased (hereinafter the "Decedent"), dated June 7, 1960 and amended on June 17, 1970 (hereinafter the "Indenture").

Plaintiffs file this First Amended Complaint pursuant to Chancery Court Rules 7(a) and 15, and file this amended pleading as a matter of course before any responsive pleading has been served. Defendant is notified that pursuant to Chancery Court Rule 15(a) it should plead in response within 10 days after service of this First Amended Complaint.

In compliance with Chancery Court Rule 15(aa), the differences between the Complaint and First Amended Complaint are described below.

A. DIFFERENCES BETWEEN THE INSTANT FIRST AMENDED COMPLAINT AND THE COMPLAINT

This First Amended Complaint differs from the Complaint earlier filed in the following general respects: (a) Henry E. I. duPont and Martha Verge duPont have been dropped as parties plaintiff; (b) a copy of the Settlement Agreement has been added as *Exhibit D*; (c) the birth dates and the dates of adoption have been alleged in paragraphs 4, 5, 6, 7 and 8; (d) references to a formal class action have been eliminated.

The following paragraphs of the Complaint have been rewritten for clarity: (a) original paragraph 35 now appears as paragraphs 33-35 and 38; (b) original paragraph 37 now appears as paragraph 40; (c) original paragraphs 48 and 50 now appear as paragraphs 52 and 53.

The following allegations of this First Amended Complaint are new: (a) the first sentence of paragraph 14; (b) paragraph 36; (c) paragraph 39; and (d) paragraph 54.

B. THE HENRY E. I. duPONT AND MARTHA VERGE duPONT FAMILY

1. Henry E. I. duPont (formerly known as "W. Henry duPont") is one of the five children of William duPont, Junior (and one of five grandchildren of William duPont, Senior). The other children of William duPont, Junior (and the grandchildren of William duPont, Senior) are: John E.

duPont, William duPont III, Evelyn duPont Donaldson and Jean Ellen duPont Shehan.

2. On September 25, 1967, Henry E. I. duPont married Martha Verge duPont. At the time of the marriage, Henry E. I. duPont was the father of children born during his earlier marriages, and Martha Verge duPont was the mother of five children of an earlier marriage. Henry E. I. duPont adopted those five children when minors under the laws of the State of Delaware.

C. THE FIVE ADULT AND ONE MINOR PLAINTIFFS

3. Plaintiff CATHERINE duPONT SCHLAEPPI is an adult, who resides at Route 8, Box 12A, High Point, North Carolina. She was born on June 1, 1955, and was lawfully adopted as a minor by Henry E. I. duPont by Decree of this Court dated March 6, 1970. She is the daughter of Martha Verge duPont, a grandniece of Decedent, and a Class A Beneficiary of her Trust.

4. Plaintiff WILLIAM GAREY SCHNEIDER is an adult, who resides at 1380 South Orlando Avenue, Coco Beach, Florida. He was born October 17, 1957, and was lawfully adopted as a minor by Henry E. I. duPont by Decree of this Court dated October 16, 1975. He is a son of Martha Verge duPont, a grandnephew of Decedent, and a Class A Beneficiary of her Trust.

5. Plaintiff CHRISTOPHER HANS SCHNEIDER is an adult, who resides with his parents Henry and Martha in Greenville, Wilmington, Delaware. He was born on February 24, 1960, and was lawfully adopted as a minor by Henry E. I. duPont by Decree of this Court dated October 16, 1975. He is a son of Martha Verge duPont, a grandnephew of Decedent, and a Class A Beneficiary of her Trust.

6. Plaintiff MARTHA ANN CAROLINE duPONT is an adult, who resides with her parents Henry E. I. duPont and Martha Verge duPont in Greenville, Wilmington, Delaware. She was born November 16, 1962, and was lawfully adopted

as a minor by Henry E. I. duPont by Decree of this Court dated November 1, 1968. She is a daughter of Martha Verge duPont, a grandniece of Decedent, and a Class A Beneficiary of her Trust.

7. Plaintiff HENRI VERGE duPONT is an adult who resides with his parents Henry E. I. duPont and Martha Verge duPont in Greenville, Wilmington, Delaware. He was born on February 1, 1966, and was lawfully adopted as a minor by Henry E. I. duPont by Decree of this Court dated November 1, 1968. He is a son of Martha Verge duPont, a grandnephew of Decedent, and a Class A Beneficiary of her Trust.

8. Plaintiff ELIZABETH AINSLEY SCHLAEPPI is a minor child, the daughter of plaintiff Catherine duPont Schlaeppi. She is a great grandniece of Decedent, and a Class B Beneficiary of her Trust. She was born June 29, 1982.

D. THE DEFENDANT

9. Defendant DELAWARE TRUST COMPANY (hereinafter the "Bank") is a corporation organized and existing under the laws of the State of Delaware, with its principal office in Wilmington, Delaware.

E. ALLEGATIONS OF FACT

10. On June 7, 1960, the Decedent and the Bank executed the Indenture which created a trust of which the Bank was designated the Trustee and Decedent was designated the Grantor. The Indenture was amended by an agreement between the Decedent and the Bank (hereinafter the "First Amendment") dated June 17, 1970. Copies of the Indenture and the First Amendment referred to above are annexed hereto and marked *Exhibits A and B* respectively.

11. Decedent died on September 4, 1984, a resident of Orange County, Virginia. Decedent's Will dated February 6, 1975 and Codicils thereto dated April 20, 1976 and January 22, 1981, respectively, were admitted to probate on September 8, 1983 by the Clerk of the Circuit Court of Orange County, Virginia.

12. The Indenture dated June 7, 1960 provided in pertinent part (Section II(b) thereof) that the Bank as Trustee should accumulate the income of the Trust and add it to the principal thereof until the date of death of the Decedent's last surviving niece or nephew who was living on June 7, 1960, at which time the Trust should terminate and the principal thereof should be payable to the grandnephews and grandnieces of the Decedent then living.

13. The First Amendment dated June 17, 1970, amended the provisions referred to in paragraph 12 above. The First Amendment, in pertinent part (Part First, Section II(2)(a)) defines the beneficiaries of the Trust as follows:

> Until such time as this trust is terminated in the manner set forth below the Trustee is authorized, from time to time, to pay so much or all of the net income of the trust, as the Trustee in its sole discretion may determine to or for the account of any one or more of the following parties who are living at the time of each particular payment and who fall within one of the following designated classes:
>
> *Class A Beneficiaries* shall consist of those parties who are or who may hereafter be grandnieces and grandnephews of the Grantor.
>
> *Class B Beneficiaries* shall consist of those parties who are or who may hereafter be great grandnieces and great grandnephews of the Grantor.
>
> *Class C Beneficiaries* shall consist of those parties who are or may hereafter be issue of the great grandnieces and great grandnephews of the Grantor who are deceased or who may die prior to the termination of this trust.

14. The First Amendment, in pertinent part (Part First, Section II(4)), construed in accordance with the law of Delaware which is made controlling by the Indenture, and which equates adopted children with biological children of the adopting parent, includes as beneficiaries of the Trust only

those adopted children one of whose biological parents was the spouse of one of Decedent's nephews and nieces; and provides that a child born to a nephew or niece during a marriage which is subsequently proven bigamous shall be included as a beneficiary of the Trust; and excludes as beneficiaries of the Trust all other children adopted by any nephew or niece—as follows:

> For the purposes of this Trust reference to "grandnieces and grandnephews" and "issue of great grandnieces and issue of great grandnephews" shall mean lawful blood descendants of the Grantor's brother, William duPont, Jr., provided always, however, that:
>
> (a) An adopted child and such adopted child's lawful blood descendants shall not be considered as lawful blood descendants of the adopting parent or parents or of anyone who is an ancestor of the adopting parent.
>
> (b) A child born to persons who are openly living together as husband and wife after the performance of a marriage ceremony between them and such child's lawful blood descendants shall be considered as lawful blood descendants of such child's parents, regardless of the fact that a purported divorce of one or both of such persons with reference to a prior marriage is invalid.

15. The Indenture provides in pertinent part (Section IV(2)) that Wilmington, Delaware shall be the situs of the Trust for administrative purposes, and that all questions pertaining to the administration of the Trust or the construction or validity of the Indenture shall be governed by the law of the State of Delaware, as follows:

> This trust indenture has been executed in the City of Wilmington, State of Delaware, which shall be the situs of this trust for administrative and accounting purposes and all questions pertaining to the administration of this trust or the construction or validity of this indenture shall be governed by the law of that State.

16. The Indenture provides in pertinent part (Article V)

that the Bank accepts the trust created by the Indenture, and agrees to administer the trust in accordance with the terms and conditions contained in the Indenture, as follows:

> The Trustee does hereby accept the trust created by this indenture and acknowledges receipt of the funds and securities set forth in Schedule A annexed hereto and does covenant and agree to faithfully execute the same in accordance with the terms and conditions herein contained.

17. On January 6, 1984, Henry E. I. duPont and his children and grandchildren, together with his brother John E. duPont, commenced in action, captioned *Henry E. I. duPont, et al. v. V. R. Shackelford, Jr., et al.*, being Chancery No. E 84-1 (hereinafter the "Virginia Action"), in the Circuit Court of Orange County, Virginia (hereinafter the "Virginia Court"), seeking a judicial determination with regard to the construction, validity and legality of key provisions of Decedent's Will and for other relief, as is more fully set out in the bill of complaint filed in the Virginia Action.

18. On January 6, 1984, Henry E. I. duPont and his children and grandchildren together with his brother John E. duPont commenced an action in this Court, captioned *Henry E. I. duPont, et al. v. Delaware Trust Company, Trustee*, being Civil Action No. 7421 (hereinafter the "original Delaware Action"), seeking a judicial determination with regard to the construction, validity and legality of key provisions of the Indenture as amended on June 17, 1970, as is more fully set forth in the complaint filed in the said original Delaware Action.

19. On June 26, 1984, the children and grandchildren of Jean Ellen duPont Shehan commenced an action in this Court, captioned *Marion duPont McConnell, et al. v. Delaware Trust Company, as Trustee*, being Civil Action No. 7673 (hereinafter the "McConnell Action"), seeking payment to the plaintiffs therein of their shares of the 1984 Trust income and

those shares which were payable to Henry E. I. duPont's biological children and grandchildren.

20. All of the issues (with two exceptions as specified therein) raised in the Virginia Action and in the original Delaware Action and in the McConnell Action, were settled by an agreement entitled "Agreement of Settlement and for the Entry of Decrees" (hereinafter the "Settlement Agreement"), dated October 15, 1984, which was executed by all *sui juris* parties in the Virginia Action and in the original Delaware Action. The Settlement Agreement was approved in a report of the four guardians ad litem who had been earlier appointed by the Virginia Court to represent various minor and unborn interests.

21. On October 22, 1984, the Virginia Court entered a Decree in the Virginia Action, in part, approving the Settlement Agreement. A copy of the Decree of the Virginia Court is annexed hereto as *Exhibit C,* and a copy of the Settlement Agreement is annexed hereto as *Exhibit D* (without exhibits).

22. On October 25, 1984, this Court entered a Decree in the original Delaware Action, in part, approving the Settlement Agreement. A copy of the Decree of this Court is annexed hereto as *Exhibit E.*

23. The Settlement Agreement provides in pertinent part (Article I(A)) that a Decree shall be entered by the Virginia Court in the Virginia Action settling and resolving all issues in the Virginia Action, "except for the adopted children issue in the Delaware Action, as provided in Article VI hereof".

24. The Settlement Agreement provides in pertinent part (Article I(B)) that Decrees shall be entered by this Court settling and resolving all issues in the original Delaware Action and the McConnell Action, "... except that the adopted children issue in the Delaware Action as defined in Article VI below is not an issue compromised or resolved by this Agreement and that issue may become the subject of a

new and separate action in the Delaware Court as stated in Article VI."

25. The Settlement Agreement provides in pertinent part (Article I(C)) that the provisions of the Settlement Agreement shall supersede any conflicting or inconsistent provisions of the Will and Codicils as follows: "The Executors shall administer the Estate in accordance with the provisions of Decedent's Will and the provisions of this Agreement, and in the event of any conflict or inconsistency between any provision of the Decedent's Will and any provision of this Agreement, the relevant provision or provisions of this Agreement shall, in all instances, control the rights and interests of the parties."

26. The Settlement Agreement provides in pertinent part (Article I(D)) that the provisions of the Settlement Agreement supersede any conflicting or inconsistent provisions of the Indenture or First Amendment, as follows: "The Trustee shall administer the Trust in accordance with the provisions of this Agreement, and in the event of any conflict or inconsistency between any provision of the Indenture and any provision of this Agreement, the relevant provision or provisions of this Agreement shall, in all instances, control the rights and interests of the parties."

27. The Settlement Agreement provides in pertinent part (Article VI(A)) that: "The 'adopted children issue' as used herein means the claim embodied in Count IV of the Delaware Action. The adopted children issue is not being settled or compromised by this Agreement or the Decrees to be entered by the Virginia and Delaware Courts, but the adopted children issue may be asserted in the new Delaware Action, as provided in paragraph B below."

28. The Settlement Agreement provides in pertinent part (Article VI(B)) that: "The parties to this Agreement who are plaintiffs in the Delaware Action, or some of them, shall have a right to file by January 1, 1985 and not thereafter, a new and separate suit in the Delaware Court raising the adopted children issue (the 'new Delaware Action'). No statute of

limitations or laches defense shall be applicable to bar any such new Delaware Action if such action is commenced prior to January 1, 1985."

29. The Settlement Agreement provides in pertinent part (Article VII(C)-(J)) with respect to the 1984 income of the Trust and the income of the Trust for succeeding years during the pendency of the instant action that five shares of Class A Beneficiary income shall be reserved and allocated to the adult plaintiffs herein; and that one share of Class B Beneficiary income shall be allocated to the minor plaintiff herein.

30. The Settlement Agreement provides in pertinent part (Article VII(J)(K)(L)) that if there is a final determination of the instant action which is favorable to the plaintiffs herein, the six allocated shares of 1984 income of the Trust shall be paid to them; and in the event there is a determination of the instant action adverse to the plaintiffs herein, the six allocated shares of 1984 Trust income shall be paid to the other Class A and Class B Beneficiaries of the Trust in equal shares.

31. The Settlement Agreement provides in pertinent part (Article VII(L)) that following each future fiscal year of the Trust during which there is no final judicial determination of the adopted children issue, the Trustee shall, similarly, pay into a separate escrow account held by the escrow agent a share of net income of the Trust for each of the then living adopted children and children of adopted children if in any such future fiscal year the Trustee has exercised its discretion in favor of distribution of income to Class A or Class B Beneficiaries.

F. CAUSES OF ACTION

Plaintiffs assert the following claims, in the alternative, in the following Counts I, II and III.

COUNT I

32. The allegations of paragraphs 1 through 31 are incorporated herein by reference as though set out at length.

33. Under the law of Delaware which controls the interpretation of the Indenture, an adopted child becomes the biological child of the adopting parent, and becomes from the date of the decree of adoption, the lawful blood descendant of the adopting parent. The plaintiffs who are the sons and daughters of Martha Verge duPont, who were adopted as minors by Henry E. I. duPont, became at the same time of their adoption members of the family of William duPont, Junior, and the lawful blood descendants of William duPont, Junior and of Henry E. I. duPont.

34. Decedent intended, as a matter of law, to include as a beneficiary of her Trust any child of a spouse of any of her nephews and nieces who was adopted by such nephew or niece, and to include also as a beneficiary any child of a nephew or niece by an earlier marriage, even if proven bigamous; but to exclude as a beneficiary of her Trust all other persons in the world who might be adopted by any of her nephews and nieces.

35. The First Amendment provides in pertinent part (Part First, Section II(4)) that a child born to any nephew or niece who is openly living together as husband and wife after the performance of a marriage ceremony between them is to be considered as the lawful blood descendant of such child's parent and of any ancestor of such child's parent, regardless of the fact that a purported divorce of such nephew or niece and such other with reference to a prior marriage is invalid.

36. Decedent's Will provides in pertinent part (Article Twenty-One (4)) that "I further direct that any direct blood descendant of my brother William duPont, Jr. and the spouse of any such direct blood descendant, who is living in Virginia at the date of his or her death, shall have the right to be buried in my said cemetery lot in Maplewood Cemetery, Gordonsville, Virginia, so long as there is space available in said cemetery lot."

37. The Indenture and the First Amendment were prepared by Potter Anderson & Corroon, and the Decedent's Will was prepared, in part, by Potter Anderson & Corroon.

38. In the alternative, plaintiffs allege that the First Amendment provides in pertinent part (Part First, Section II(4)) that—as a matter of fact—the Decedent intended to include as a beneficiary of her Trust the child of a spouse of any of her nephews and nieces, adopted by such nephew or niece, and the child of a marriage between any such nephew or niece and another even if the marriage proved to be bigamous; and to exclude as a beneficiary of her Trust all other persons in the world who might be adopted by such nephew or niece.

39. Potter Anderson & Corroon knew of these intentions of Decedent.

40. As to Decedent's intentions, if any—as a matter of fact—plaintiffs allege, in the alternative—that on June 17, 1970 (the date of execution of the First Amendment) Decedent was 76 years old; that at the time of her death on September 4, 1983 at age 89, Decedent was suffering from Alzheimer's disease, dementia, cardiovascular disorders, blindness and other serious physical and mental disorders and illnesses; and that she had suffered from some or all of these afflictions for years prior to her death; and that for years prior to her death, Decedent was not capable of and did not handle her business and personal affairs.

COUNT II

41. The allegations of paragraphs 1 through 40 are incorporated herein by reference as though set out at length.

42. Section 919(a) of 13 Delaware Code provides that "Upon the issuance of the decree of adoption, the adopted child shall be considered the child of the adopting parent or parents, entitled to the same rights and privileges and subject to the same duties and obligations as if he had been born in wedlock to the adopting parent or parents."

43. Delaware law controls the interpretation of the Indenture and First Amendment, and the provisions of Section 919(a) of 13 Delaware Code are deemed to have been

incorporated into the pertinent provision of the First Amendment (Part First, Section II(4)(a)). As a result, the five plaintiff children of Martha Verge duPont are deemed, as a matter of law, to have been born in wedlock to Henry E. I. duPont (the adopting parent) and Martha Verge duPont. These plaintiffs are all lawful blood descendants of William duPont, Junior and of Henry E. I. duPont, and are Class A Beneficiaries of the Trust. The minor plaintiff is also a lawful blood descendant of William duPont, Junior and of Henry E. I. duPont, and is a Class B Beneficiary of the Trust.

44. Any interpretation of Section II(4)(a) of the First Amendment excluding the plaintiffs as beneficiaries of the Trust would violate Section 919(a) of 13 Delaware Code and would make Section II(4)(a) null and void.

COUNT III

45. The allegations of paragraphs 1 through 44 are incorporated herein by reference as though set out at length.

46. A determination that the plaintiffs who are the children of Martha Verge duPont and of Henry E. I. duPont, by adoption are not beneficiaries of the Trust would constitute State action, and violate rights of the plaintiffs under the Fourteenth Amendment to the Constitution of the United States.

47. Freedom of personal choice in matters of family life is a right protected by the Fourteenth Amendment. The foundation of society in this country is the family. The family is created by biological parenthood or by adoption. Under Delaware law, and under the Fourteenth Amendment, adopted children are the same as biological children.

48. Henry E. I. duPont and Martha Verge duPont, parents of five plaintiffs herein, had, and have, a right under the Fourteenth Amendment to maintain a family without separation of their children into categories of biological and adopted. The five plaintiffs, children of an earlier marriage of Martha Verge duPont, equally had, and have, a right under

the Fourteenth Amendment to be treated by this Court as lawful blood descendants of Henry E. I. duPont and as a part of the "duPont family", the family of William duPont, Junior.

49. This Court can not, consonant with the Fourteenth Amendment, give instructions which direct the Bank not to treat the five plaintiffs as lawful blood descendants of William duPont, Junior and Henry E. I. duPont as provided by Delaware law.

50. Under the Fourteenth Amendment, the five plaintiffs and the biological children of Henry must be treated equally, as lawful blood descendants of Henry E. I. duPont and of William duPont, Junior.

51. An instruction of this Court denying the five plaintiffs the status of beneficiaries of the Trust would invidiously discriminate against them in favor of the biological children of Henry E. I. duPont and such an instruction would punish them because of their status of having been adopted under the law of Delaware, which provides otherwise. Such an instruction would punish the five plaintiffs, even though they had no power as infants to affect their status of being adopted, or because some of them chose to have such status. Such an instruction would violate the five plaintiffs' right to live in a family in which biological and adopted children are the same. Such an instruction would violate the right of Henry E. I. duPont and Martha Verge duPont to establish and maintain a family without the separation of children into classes of biological and adopted children. Such an instruction would violate the right of the five plaintiffs to be treated the same as the children of the other nephews and nieces of Decedent.

G. ATTORNEYS' FEES

52. This Court's determination of the issues raised herein will affect important aspects of the administration of the Trust and will be a benefit to the Trust and the beneficiaries. Plaintiffs herein and their attorneys will be entitled to an award of reasonable attorneys' fees, payable out of the principal of the Trust, on account of such benefit. Plaintiffs

and their attorneys seek the guidance and aid of the Court, in accordance with the Settlement Agreement and the Decrees of the Virginia Court and of this Court entered pursuant thereto.

53. The plaintiffs attorneys will be entitled to an award of reasonable attorneys' fees, payable out of the principal of the Trust, in addition, for having created a common fund and for having conferred substantial benefits upon the plaintiffs and other beneficiaries of the Trust.

H. SERVICE OF THIS FIRST AMENDED COMPLAINT UPON ALL THE BENEFICIARIES OF THE TRUST

54. A copy of this First Amended Complaint will be served, by registered mail, upon the beneficiaries of the Trust other than plaintiffs who signed the Settlement Agreement, giving them notice of the pendency of this action.

I. RELIEF REQUESTED

WHEREFORE, plaintiffs request that the Court issue an Order granting the following relief as follows:

1. Ordering, adjudging and decreeing that plaintiffs are the lawful blood descendants of Henry E. I. duPont and of William duPont, Junior, and that they are proper Class A Beneficiaries and a proper Class B Beneficiary of the Trust.

2. Ordering, adjudging and decreeing that Delaware Trust Company, Trustee, shall:

(a) pay to the plaintiffs the shares of Class A Beneficiary 1984 Trust income which was escrowed pursuant to the Settlement Agreement;

(b) pay the one share of 1984 Class B Beneficiary Trust income which was escrowed pursuant to the Settlement Agreement; and

(c) pay each of the plaintiffs his or her respective share of the principal of the Trust at the time of the termination of the Trust.

3. Awarding to plaintiffs and to plaintiffs' attorneys reasonable attorneys' fees as well as all costs and disbursements of this litigation.

4. Awarding to plaintiffs such other and further relief as to the Court shall seem fair and reasonable in the premises.

HECKLER, CATTIE & PHILLIPS

By /s/ JOHN C. PHILLIPS, JR.
JOHN C. PHILLIPS, JR.

Ninth Street Plaza Building
200 West Ninth Street
Wilmington, DE 19899
(302-573-4800)

MORRIS L. WEISBERG
BLANK, ROME, COMISKY & McCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103

Of Counsel

February 21, 1985

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CATHERINE duPONT SCHLAEPPI, WILLIAM GAREY SCHNEIDER, CHRISTOPHER HANS SCHNEIDER, MARTHA ANN CAROLINE duPONT, and HENRI VERGE duPONT, children of Henry E. I. duPont and Martha Verge duPont,	)	
and	)	
ELIZABETH AINSLEY SCHLAEPPI, a child of Catherine duPont Schlaeppi,	)	Civil Action No. 7898
Plaintiffs,	)	
v.	)	
DELAWARE TRUST COMPANY, Trustee under a Trust Indenture with Marion duPont Scott, Deceased, dated June 7, 1960, and amended on June 17, 1960,	)	
Defendant.	)	

MOTIONS OF DEFENDANT DELAWARE TRUST COMPANY UNDER CHANCERY RULES 12, 17 AND 19

Defendant, Delaware Trust Company (the "Trustee"), Trustee under Indenture dated June 7, 1960, as amended June 17, 1970 and April 29, 1976 (the "Trust"), moves the Court as follows:

1. For an order pursuant to Chancery Rule 12(b)(6) dismissing Counts I, II, III, and IV of the first amended

complaint because each such count fails to state a claim against the Trustee upon which relief can be granted.

2. Without limiting the grounds that may be asserted under paragraph 1 hereof, for an order pursuant to Chancery Rule 12(b)(6) dismissing Counts I and III of the first amended complaint on the grounds that both counts were compromised in the Settlement Agreement (Exhibit D—to the first amended complaint) and are barred by the Virginia and Delaware Decrees (Exhibits C and E to the first amended complaint), which restrict the claim that plaintiffs may assert in this action to the claim previously alleged in Count IV of the Delaware Action (C.A. No. 7421) that the Trust, under Delaware law, unlawfully excludes adopted persons. All other claims and issues, including complex factual issues relating to Mrs. Scott's intent or mental capacity and novel legal issues concerning the validity of the Trust under the U.S. Constitution, have been settled and are barred.

3. For an order pursuant to Chancery Rule 12(f) or Chancery Rule 12(b)(6), either striking as immaterial, or dismissing, the allegations contained in paragraph 40 of the first amended complaint regarding the physical and mental condition of Mrs. Scott. All of the issues involved in the Virginia Action and in the Delaware Action (except the adopted children issue) were settled in the Settlement Agreement and made subject to the res judicata effect of the Virginia and Delaware Decrees. Hence, by agreement, by the Decrees of both courts, and by the principles of res judicata, plaintiffs are absolutely and forever barred from renewing the cited allegations in paragraph 40 of the first amended complaint that in the execution of her Will and the amendments to her Trust, Mrs. Scott lacked mental capacity or was under the undue influence of others.

4. For an order pursuant to Chancery Rule 12(f) or Chancery Rule 12(b)(6) either striking as immaterial, or dismissing, the allegations contained in paragraphs 34 and 37 through 40 of the first amended complaint that Mrs. Scott intended not to exclude the adopted children of Henry E. I.

duPont as beneficiaries of the Trust. The Trust expressly and unambiguously states that beneficiaries of the Trust shall be limited to "lawful blood descendants" of William duPont, Jr., and on adopted children and their lawful blood descendants "shall not be considered as lawful blood descendants." Given such unambiguous language, extrinsic evidence of Mrs. Scott's intent, or of the circumstances at the time of the execution of the June 17, 1970 Amendment to the Trust, cannot be admitted to vary or contradict the terms of the Trust. Allegations as to Mrs. Scott's intent are thus immaterial and should be stricken or dismissed.

5. For an order pursuant to Chancery Rule 19 compelling plaintiffs to join the 31 natural grandchildren and great grandchildren of William duPont, Jr. who have substantial, vested beneficial interests in the income of the Trust, which any decree of this Court upon the relief sought by plaintiffs would vitally affect. Hence, the following persons must be joined, as needed for a just adjudication, as additional defendants to this action:

Children of Henry E. I. duPont

Deborah duPont Pries
Henry Laurence duPont
Harriet Nicole duPont
Beverly Austin duPont
William Henry duPont, Jr.
Sophie-Madeleine duPont
Henry E. I. duPont, II

Children of Evelyn duPont Donaldson

Judith D. Jordan
Linda D. Donaldson
Charlotte A. D. Maher
Elise D. Bulger

Children of Jean Ellen duPont Shehan

Marion duPont McConnell
Susan McConnell Rinehart
James H. T. McConnell, Jr.

Child of William duPont III
William duPont

Children of Deborah duPont Pries
William Lawrence duPont Melick
Benjamin Pries
Christopher John Pries

Children of Henry Laurence duPont
Laurance duPont
Jennifer Ann duPont
Jason Joseph duPont

Children of Judith D. Jordan
Jennifer A. McClellan
Erica B. McClellan
Matthew B. McClellan

Children of Charlotte A. D. Maher
Hilary L. Maher
Meredith Snow Maher

Children of Elise D. Bulger
Jordan N. H. Bulger
Andrew B. Bulger
Adam C. Bulger

Children of Susan McConnell Rinehart
Stephanie Marion Rinehart
Caroline Tyler Rinehart

In the alternative, upon plaintiff's failure to join the 31 natural grandchildren and great grandchildren of William duPont, Jr., for an order pursuant to Chancery Rule 12(b)(7) dismissing this action for failure to join indispensable parties.

6. For an order pursuant to Chancery Rule 17(c), upon the joinder as defendants of the natural grandchildren and great grandchildren of William duPont, Jr., appointing a person having no interest in the cause as guardian ad litem for the unborn natural issue of William duPont, Jr. and for the following minors:

Children of Henry E. I. duPont

Sophie Madeleine duPont
Henry E. I. duPont, II

Child of William duPont III

William duPont IV

Children of Deborah duPont Pries
William Lawrence duPont Melick
Benjamin Pries
Christopher John Pries

Children of Henry Laurence duPont

Laurence duPont
Jennifer Ann duPont
Jason Joseph duPont

Children of Judith D. Jordan

Jennifer A. McClellan
Erica B. McClellan
Matthew B. McClellan

Children of Charlotte A. D. Maher

Hilary L. Maher
Meredith Snow Maher

Children of Elise D. Bulger

Jordan N. H. Bulger
Andrew B. Bulger
Adam C. Bulger

Children of Susan McConnell Rinehart

Stephanie Marion Rinehart
Caroline Tyler Rinehart

POTTER ANDERSON & CORROON

By /s/ BLAINE T. PHILLIPS
Blaine T. Phillips

By /s/ DANIEL F. LINDLEY
Daniel F. Lindley
350 Delaware Trust Bldg.
P.O. Box 951
Wilmington, DE 19899

Attorneys for Defendant
Delaware Trust Company

Dated: March 1, 1985

THIS TRUST INDENTURE made and entered into this 7th day of June, 1960, by and between MARION duPONT SCOTT of "Montpelier", Orange County, Virginia, hereinafter referred to as "Grantor", and the DELAWARE TRUST COMPANY, a corporation of the State of Delaware, hereinafter referred to as "Trustee",

WITNESSETH:

That the Grantor, for and in consideration of the sum of ONE DOLLAR ($1.00) cash in hand to her paid by the Trustee, the receipt whereof is hereby acknowledged, and of the covenants and agreements herein contained, has assigned, transferred and set over unto the Trustee, the items set forth in Schedule A hereto annexed and made a part hereof, and such other sums of money, securities and other property, real or personal, as may be delivered, assigned, conveyed, devised or bequeathed to said Trustee or incorporated herein by endorsement hereon, or otherwise placed under the trust hereby created by proper instrument or instruments.

TO HAVE AND TO HOLD the above mentioned money, securities and other properties and such as may be added thereto unto the said Trustee, IN TRUST, NEVERTHELESS, for the following uses and purposes to-wit:

SECTION I. To hold, manage, invest, reinvest and keep invested the corpus thereof in such stocks and securities or other property as the Trustee in its wise discretion shall deem proper, and to demand, collect and receive the interest, dividends and income therefrom, and after the deduction of all proper or necessary charges and expenses and the payment of any federal or state income tax which may be due by the Grantor on income received from this trust or from other sources to pay over so much of the net income and so much of the corpus of the trust to the Grantor in such manner and in such amounts as the Grantor may from time to time direct in writing. In the event of the disability of the Grantor, the Trustee shall exercise its complete discretion in determining

the amount to be paid to or for the account of the Grantor during her lifetime out of the net income and corpus of the trust.

SECTION II. Upon the death of the Grantor, the Trustee shall as soon as practical make the following payments in cash out of the trust estate, and hold and dispose of the balance of the trust estate in the following manner:

(a) In the event there are insufficient assets in the residuum of the estate of the Grantor with which to pay all estate, inheritance or other succession taxes in full, which shall become payable by reason of the death of the Grantor and to provide for full payment of the legacies and the carrying out of the devises and bequests made under the terms of the last will of the Grantor or any codicil thereto, the Trustee shall pay out of the trust estate unto the Internal Revenue Service of the United States and unto the department of any and all states entitled to levy and collect a tax or taxes from the estate of the Grantor or on any part or parts thereof respectively, upon notice or notices received by the Trustee from the Executors under Grantor's last will and testament, or from the person or corporation charged with the administration of Grantor's estate, such amount or amounts as shall be necessary to pay in full the balance of all such estate, inheritance or other succession taxes (including any interest and penalties thereon), so that the specific legacies and the devises and bequests made under the terms of the last will of the Grantor shall be paid and carried out as therein provided and not be charged with their proportionate share of said taxes or duties. Certification by the executors under Grantor's last will and testament or from the person or corporation charged with the administration of grantor's estate of the amounts required for these purposes shall constitute full authority to the Trustee for the payment of the same.

(b) All the rest, residue and remainder of the trust estate shall be held, invested and re-invested in such stocks and securities or other property as my Trustee in its wise discretion shall deem proper, and my Trustee shall demand, collect

and receive the interest, dividends and income therefrom, and pay all proper or necessary charges and expenses, including any State or Federal Fiduciary Income Tax on income not distributed or distributable to the beneficiaries hereunder, and shall accumulate the net income from the trust and add the same to the principal until the date of the death of the last surviving niece or nephew of the Grantor who was living on the date of the execution of this trust indenture, at which time the trust estate and any additions or accretions thereto shall be divided into as many equal shares as there may be grandnephews and grandnieces of the grantor living at the time and issue of any grandnephews and grandnieces of the Grantor who may then be deceased, the share so set aside for the issue of any deceased grandnephew or grandniece being per stirpes the share which would have been set aside for the parent of said issue, had said parent been living. Any such share so set aside for the issue of any grandnephew or grandniece of the Grantor shall vest in and be paid outright to said issue per stirpes subject only to the provision hereinafter made with respect to the share of a minor. Any share so set aside for any grandnephew or grandniece of the Grantor who may then be living shall be held in further separate trust and the income from said trust shall be paid in quarterly installments to said grandnephew or grandniece for and during his or her natural life, subject however to the provision hereinafter made for an earlier termination of said trust, and after his or her death or upon an earlier termination of said trust in the manner hereinafter provided, the corpus of said trust shall vest in and be paid outright to his or her issue per stirpes, subject only to the provision hereinafter made with respect to the share of a minor, or if there be no issue, said corpus shall be divided equally among and vest in and be paid outright to the grandnephews and grandnieces of the Grantor then surviving, and the issue per stirpes of any such grandnephews and grandnieces who may then be deceased, subject only to the provision hereinafter made with respect to the share of a minor. Notwithstanding anything hereinabove contained to the contrary, the trusts herein established shall terminate and the

corpus of said trusts together with any accretions or additions thereto shall vest in and be paid outright to the parties receiving the income therefrom in the proportions in which they are then entitled to share such income at the expiration of a term not exceeding twenty-one (21) years after the death of the survivor of all of Grantor's grandnephews and grandnieces living at the date of the execution of this trust indenture, provided, however, said payment shall be subject to the provision hereinafter made with respect to the share of a minor. If, under the foregoing provision a minor becomes entitled to receive any share or part of the principal of any trust hereinabove created and no provision is made for the retention thereof during his or her minority, I direct that the Trustee retain such share or part in trust with power and authority in my Trustee to pay to, or expend for the benefit of, such minor, with or without the intervention of a guardian, so much of the income and principal of his or her share or part of said trust, as in the Trustee's sole discretion, it shall deem necessary for the support, maintenance and education of such minor until he or she attains twenty one years of age, at which time he or she shall be entitled to receive his or her share or part free of any trust. The foregoing provision shall not be construed to postpone the vesting of any share or part of any such trust in such minor, but shall only have the effect of postponing his or her uncontrolled enjoyment thereof during minority.

SECTION III. Grantor authorizes and empowers the Trustee with respect to each of the trusts herein created:

(1) To retain any and all investments or other properties conveyed hereunder or hereafter added hereto so long as Trustee shall deem proper and for the best interest of the trust estate hereby created, and at any time or times to sell, dispose of and make valid transfer of the securities forming a part of the trust hereby created, and to invest the proceeds thereof from time to time in such stocks, securities and other property as to it may seem proper, with due regard for the safety of the principal and a reasonable return of income therefrom, without confining Trustee to what are known as "legal invest-

ments" for trustees under the laws of the State of Delaware, and also to continue to sell and dispose of and transfer investments and reinvestments and reinvest the proceeds under like ample power, provided, however, that during the lifetime of Grantor all sales of investments and/or investments and reinvestments shall be with the consent of Grantor, and further, Grantor may direct the investment of the corpus or principal held hereunder in such investments as she may think proper.

(2) To vote in person or by proxy all securities held in the trust estate and to make subscriptions for stock and bond privileges and allotments to which this trust may be entitled by reason of its holdings of securities of companies by whom such privileges are given, to such extent as Trustee may, in its discretion, deem best, and to deposit shares of stock and bonds held hereunder from time to time for the purpose of taking part in any foreclosure, merger or reorganization proceedings, and, at its discretion, to pay assessments in connection therewith.

(3) To sell, convey, or exchange at public or private sale, for cash or upon credit or partly for cash and partly for credit, and upon such terms as it shall deem proper any property, real or personal, which is a part of the trust estate, or to lease the same for terms longer or shorter than the trust on such terms as it may consider reasonable, and no purchaser or lessee shall be bound to inquire into the validity of any such sale or lease, or to see to or be liable for the application of the purchase moneys or rent arising therefrom.

(4) To borrow money and to pledge any personal or real property forming a part of this trust.

(5) To purchase investments at a premium or discount.

(6) To determine whether any receipt or disbursement should be allocated to principal or income or partly to each.

(7) To compromise, adjust, release and discharge any and all debts or claims due or owing to the Trustee and any

and all claims or demands against the trust hereby created without express or prior authority from any court.

(8) To carry investments in the name of a nominee.

(9) In case of the disability (through illness or other cause) of a beneficiary hereunder to apply all sums payable to such beneficiary for his or her comfort and support.

(10) In any case in which Trustee is required to divide any securities or other property into shares or parts, or to distribute the same, such division or distribution shall be made in kind or in money, or partly in kind and partly in money, and to that end the Trustee is hereby authorized to allot specific securities or property, real or personal, or an undivided interest therein to any share or part, and its judgment concerning the propriety thereof and the relative value of the securities and property so allotted shall be deemed fair and reasonable as to all persons having any interest in the trusts.

(11) The interest of any beneficiary hereunder, excepting the Grantor, either as to income or principal of the trust fund, shall not be anticipated, alienated, or in any other manner assigned or transferred by such beneficiary, nor shall the same be subject to any legal process, bankruptcy proceedings or the interference or control of creditors or others; and in the event any attempt should be made to attach by legal process any of the income arising from any of the said trust funds, the said Trustee is hereby authorized in its uncontrolled discretion to withhold from time to time any part or all of the income so attempted to be attached. All payments of income and principal herein provided to be made shall be made by said Trustee into the hands of the beneficiary entitled thereto, or mailed to such beneficiary's last known address, or deposited to the account of such beneficiary in a bank or trust company of good standing and responsibility, without regard to any order or assignment purporting to transfer the same to any other person.

(12) To employ counsel and agents and to pay them

reasonable compensation, and to incur and pay such other expenses and charges in connection with the trusts hereby created as it may deem necessary or advisable.

SECTION IV. (1) The Grantor expressly states that this indenture and the trust hereby created shall be revocable by her in whole or in part and may be amended in any and all respects by Grantor from time to time by proper instrument or instruments executed by her and lodged with the Trustee.

(2) This trust indenture has been executed in the City of Wilmington, State of Delaware, which shall be the situs of this trust for administrative and accounting purposes and all questions pertaining to the administration of this trust or the construction or validity of this indenture shall be governed by the law of that State.

(3) The Trustee shall be entitled to reasonable compensation for its services hereunder during the continuance of this trust and to a reasonable fee for distribution of principal during the continuance and at the termination of this trust. During the continuance of this trust such compensation shall be deemed reasonable if determined in accordance with the Rules of the Court of Chancery of the State of Delaware as they are from time to time decreed by said Court; provided, however, that in the event any moneys or other property constituting a part of this trust estate, whether treated as income or as principal, has been paid or transferred to this trust from another trust or trusts under which the Trustee hereunder has already received an income commission, such income shall not be subject to any further income commission to the Trustee hereunder. In like manner a distribution fee at the termination of this trust shall be deemed reasonable if determined in accordance with the aforesaid Rules of the Court of Chancery of the State of Delaware.

(4) No bond or other security shall be required of any Trustee acting hereunder.

SECTION V. The Trustee does hereby accept the trust created by this indenture and acknowledges receipt of the

funds and securities set forth in Schedule A annexed hereto and does covenant and agree to faithfully execute the same in accordance with the terms and conditions herein contained.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in duplicate as of the day, month and year first above written.

/s/ MARION DUPONT SCOTT (seal)
Marion duPont Scott, Grantor

DELAWARE TRUST COMPANY

BY: /s/ PAUL D. LOVETT
Vice President and Trust Officer

* * *

THIS AMENDMENT TO TRUST INDENTURE made and entered into this 17th day of June, 1970, by and between MARION duPont SCOTT, of "Montpelier," Orange County, Virginia, hereinafter referred to as "Grantor," and DELAWARE TRUST COMPANY, a corporation of the State of Delaware, hereinafter referred to as "Trustee,"

WITNESSETH:

WHEREAS, by Trust Indenture, dated the 7th day of June 1960, a trust was established by the "Grantor" to be held and administered by the "Trustee" in accordance with the terms thereof to which reference is hereby made; and

WHEREAS, the parties hereto desire to amend said Trust Indenture as hereinafter set forth;

NOW, THEREFORE, the parties hereto do hereby contract and agree as follows:

FIRST: SECTION II of the Trust Indenture, dated the 7th day of June, 1960, beginning on page 2 and ending on page 4 of said Trust Indenture is hereby revoked and cancelled in its entirety, and in lieu thereof the following is substituted therefor:

SECTION II. Upon the death of the Grantor, the Trustee shall transfer any income on hand and accrued as of the date of the death of the Grantor to the principal of the trust. Thereafter the Trustee shall make the following payments in cash out of the principal of the trust and hold and dispose of the balance of the trust principal in the following manner:

1 (a) In the event there are insufficient assets in the Grantor's probate estate with which to pay all of Grantor's just debts, funeral expenses and costs in connection with the administration of Grantor's estate, including any income taxes which may be due by Grantor or by Grantor's estate, and all estate and inheritance taxes upon or with respect to any property which is required to be included in Grantor's estate for such tax purposes (including any interest and penalties thereupon) and to provide for full

payment and distribution of any bequest, legacy, devise or annuity made or provided for by Grantor's last will and testament and any codicil thereto, the Trustee shall make such payments as may be necessary to pay the same in full. Any payment of taxes shall be made directly to the Internal Revenue Service of the United States, or to the State or other governmental body levying the same. All other payments required to be made as aforesaid shall be made to the Executors of Grantor's estate or to the person or corporation charged with the administration of Grantor's estate. Certification by the Executors of Grantor's estate or by the person or corporation charged with the administration of Grantor's estate of the amount or amounts required for these purposes shall constitute full authority to the Trustee for payment of the same.

(b) If in the opinion of the Executors of Grantor's estate, or of the person or corporation charged with the administration of Grantor's estate, payments, as authorized in sub-paragraph (a) above, are either required to be made, or should be made prior to the complete liquidation of assets in Grantor's estate available for that purpose, it is directed that the Trustee make advances or non-interest bearing loans to Grantor's estate to be used for that purpose, with repayment to be made as assets in Grantor's probate estate are liquidated. In the event upon the complete liquidation of all assets in Grantor's probate estate available for that purpose, there are insufficient funds with which to pay the balance of any such advances or loans, the Trustee is authorized and directed to cancel any balances which may be due on the same. Certification of the Executors of Grantor's estate or of the person or corporation charged with the administration of Grantor's estate of the amount or amounts required for the aforesaid purposes shall constitute full authority to the Trustee to make any such advances or loans, and further certification by said parties or either of them that there are no further assets in the probate estate of the

Grantor with which to repay any outstanding balance of said advances or loans shall constitute full authority to the Trustee to cancel any such balance which may be due on the same.

2. All the rest, residue and remainder of the trust estate shall be held, invested and re-invested in such stocks and securities or other property as the Trustee in its wise discretion shall deem proper, and the Trustee shall demand, collect and receive the interest, dividends and income therefrom, and pay all proper or necessary charges and expenses, including any State or Federal Fiduciary Income Tax on income not distributed or distributable to the beneficiaries hereunder, and shall dispose and pay over the principal and income of the trust in the following manner:

(a) Until such time as this trust is terminated in the manner set forth below the Trustee is authorized, from time to time, to pay so much or all of the net income from the trust, as the Trustee in its sole discretion may determine to or for the account of any one or more of the following parties who are living at the time of each particular payment and who fall within one of the following designated classes:

Class A Beneficiaries shall consist of those parties who are or who may hereafter be grandnieces and grandnephews of the Grantor.

Class B Beneficiaries shall consist of those parties who are or who may hereafter be great grandnieces and great grandnephews of the Grantor.

Class C Beneficiaries shall consist of those parties who are or may hereafter be issue of the great grandnieces and great grandnephews of the Grantor who are deceased or who may die prior to the termination of this trust.

In the absence of unusual circumstances, it is suggested that income distributions be made on a per capita

basis in substantially equal shares to those parties who are Class A Beneficiaries living at the time of each distribution, and likewise that income distributions be made on a per capita basis in substantially equal shares to those parties who are Class B Beneficiaries living at the time of each distribution, without any requirement or suggestion, however, that distributions to members of one of the aforesaid classes equal distributions to members of the other class. It is further suggested that at the time when any distribution is made to Class 3 Beneficiaries, there be a distribution to Class C Beneficiaries on a per stirpes basis so that the issue of any Class B Beneficiary who may be deceased at the time of any distribution will take the share which would normally have been distributed to his, her or their ancestor, if living. These suggestions are to be considered guidelines only, and the Trustee shall have sole and full discretion in this request.

Any income not distributed on an annual basis shall be added to and become a part of the principal of the trust.

(b) This trust shall terminate at the end of the twentieth year following the date of the death of the last surviving Class A or Class B Beneficiary who was living at the date of the execution of this Amendment to Trust Indenture on the 17th day of June, 1970, and at that time the trust fund, including any undistributed income, shall be distributed in equal shares to the great grandnieces and great grandnephews of the Grantor living at that time and to the then living issue of any great grandniece and great grandnephew of the Grantor who may then be deceased, said issue taking per stirpes the share his, her or their ancestor would have taken, if living.

(c) In any case where there is income to be distributed to a beneficiary who is under twenty-one years of age, the Trustee may in its full discretion pay or distribute the same in any one or more of the following ways:

(1) pay the same directly to the beneficiary

(2) pay the same to a third party to cover expenses incurred for the use and benefit of said beneficiary.

(3) pay the same to either of the parents of said beneficiary for the use and benefit of the beneficiary without requiring an accounting therefor.

(4) pay the same to any custodian for such minor who is qualified to receive and administer custodial property for said minor under the "Delaware Uniform Gifts to Minors Act."

(d) In any case where a minor becomes entitled to receive any share or part of the principal of the trust herein created and no provision is made for the retention thereof during his or her minority, it is directed that the Trustee retain such share or part in trust with power and authority in the Trustee to pay to, or expand for the benefits of such minor, with or without the intervention of a guardian, so much of the income and principal of his or her share or part of said trust as the Trustee, in its sole discretion, shall deem necessary for the support, maintenance and education of such minor without regard to the duty of any individual to support such person and without regard to any other funds which may be available for the purpose until he or she attains twenty-one years of age, at which time he or she shall be entitled to receive his or her share or part free of any trust. The foregoing provision shall not be construed to postpone the vesting of any share or part of any such trust in such minor, but shall only have the effect of postponing his or her uncontrolled enjoyment thereof during minority.

3. Upon completion of the administration of Grantor's probate estate the Trustee shall as soon as practical provide a copy of this Trust Indenture as amended to each Class A and Class B Beneficiary who is twenty-one years of age and to one of the parents or the guardian of any such beneficiary who is under twenty-one years of age. These parties and their descendants shall have the

responsibility of advising the Trustee as to the status of any members of their respective families who may be Class A, Class B or Class C Beneficiaries and shall furnish the Trustee with birth certificate of any party who may thereafter become a member of any such Classes. The Trustee, in the exercise of due discretion, shall have the right to rely on any such information furnished in this respect.

4. For the purposes of this Trust reference to "grandnieces and grandnephews and great grandnieces and great grandnephews" and "issue of great grandnieces and issue of great grandnephews" shall mean lawful blood descendants of the Grantor's brother, William duPont, Jr., provided always, however, that:

(a) An adopted child and such adopted child's lawful blood descendants shall not be considered as lawful blood descendants of the adopting parent or parents or of anyone who is an ancestor of the adopting parent.

(b) A child born to persons who are openly living together as husband and wife after the performance of a marriage ceremony between them and such child's lawful blood descendants shall be considered as lawful blood descendants of such child's parents and of any ancestor of such child's parents, regardless of the fact that a purported divorce of one or both of such persons with reference to a prior marriage is invalid.

SECOND: Sub-paragraph (3) of Section IV of the Trust Indenture, dated the 7th day of June 1960, beginning on page 7 and ending on page 8 of said Trust Indenture is hereby revoked and cancelled in its entirety and in lieu thereof the following is substituted therefor:

(3) The Trustee shall be entitled to receive, out of the income and principal of the trust estate, as compensation for its services rendered hereunder, commissions at the rates allowed to a sole trustee of a testamentary trust under the laws of the State of Delaware the rules of

the Court having jurisdiction over testamentary trusts in the State of Delaware in effect at the time such commissions become payable, provided, however, that in the event any money or other property constituting a part of this trust estate, whether treated as income or principal, has been paid or transferred to this trust from another trust or trusts under which the Trustee hereunder has already received an income commission, such money or other property shall not be subject to any further income commission to the Trustee hereunder.

THIRD: The original trust agreement, dated the 7th day of June 1960 as hereby amended is hereby ratified and confirmed in all respects.

IN WITNESS WHEREOF, the Grantor has hereunto set her hand and seal, and Delaware Trust Company, Trustee, has caused this Amendment to Trust Indenture to be signed in its name and on behalf by Lawrence F. Meehan its Senior Vice President and Trust Officer and its corporate seal to be hereto affixed and attested by M. L. Woodward, Jr. its Assistant Secretary, in duplicate as of the day, month and year first above written.

/s/ MARION DUPONT SCOTT (seal)
Marion duPont Scott

DELAWARE TRUST COMPANY

BY: /s/ L. F. MEEHAN (seal)
Senior Vice President and Trust Officer

* * *

AGREEMENT OF SETTLEMENT AND FOR THE ENTRY OF DECREES

PREAMBLE

AGREEMENT, made as of the 15th day of October, 1984, between and among all the following persons who, if individuals, are *sui juris* and are parties in the case of *Henry E. I. duPont, et al. v. V. R. Shackelford, Jr., Individually and Executor of the Estate of Marion duPont Scott, et al.*, Chancery No. E 84-1 (the "Virginia Action"), pending in the Circuit Court of the County of Orange, Virginia (the "Virginia Court"); and some of whom are parties in the case of *Henry E. I. duPont, et al. v. Delaware Trust Company, Trustee Under Trust Indenture dated June 7, 1960,* Civil Action No. 7421 (the "Delaware Action"), pending in the Delaware Court of Chancery in and for the County of New Castle (the "Delaware Court"):

—Henry E. I. duPont, his children, Deborah duPont Pries; Henry Laurence duPont; Harriet Nicole duPont; Beverly Austin duPont and William Henry duPont, Jr.; and his adopted children, Catherine duPont Schlaeppi; William Garey Schneider; Christopher Hans Schneider; Martha Anne Caroline duPont; and Henri Verge duPont;

—John E. duPont;

—William duPont III:

—Evelyn duPont Donaldson, and her children, Judith D. Jordan; Elise D. Bulger; Charlotte A. D. Maher; and Linda D. Donaldson.

—Jean Ellen duPont Shehan, and her children, Marion duPont McConnell; Susan McConnell Rinehart; and James H. T. McConnell, Jr.;

—V. R. Shackelford, Jr., David C. Rittenhouse, and William duPont III, Executors of the Estate of Marion duPont Scott;

—V. R. Shackelford, Jr.;

—Delaware Trust Company, Trustee under Indenture dated June 7, 1960, as amended, with Marion duPont Scott;

—Gerald L. Baliles, Attorney General of the Commonwealth of Virginia; and

—The National Trust for Historic Preservation in the United States.

V. R. Shackelford, III and Martha Ann Caroline Verge duPont are also parties to this Agreement.

RECITALS

A. Marion duPont Scott ("Decedent") died on September 4, 1983, a resident of Montpelier Station, Orange County, Virginia, and was survived by five nephews and nieces, namely, Henry E. I. duPont, John E. duPont, William duPont III, Evelyn duPont Donaldson and Jean Ellen duPont Shehan, and the children and grandchildren of her nephews and nieces who are her grandnephews and grandnieces and great grandnephews and grandnieces.

B. Paper writings dated February 6, 1975, dated April 20, 1976, and dated January 22, 1981 were admitted to probate on September 8, 1983 by the Clerk of the Virginia Court as the Will and Codicils of Decedent ("Decedent's Will"), copies of which paper writings are attached hereto as Exhibit A.

C. William duPont III, David C. Rittenhouse and V. R. Shackelford, Jr. ("Executors"), qualified as Executors of Decedent's Estate on September 8, 1983, after posting bond without surety in the penalty of Thirty One Million Five Hundred Thousand Dollars ($31,500,000.00), conditioned and payable according to law.

D. The Decedent executed a trust indenture dated June 7, 1960 in which Delaware Trust Company of Wilmington, Delaware, is named as Trustee, which indenture was amended on June 17, 1970, and, it is claimed by certain parties to the Virginia and Delaware Actions, was amended by

a paper writing dated April 20, 1976, a claim which plaintiffs in the Virginia and Delaware Actions contest, copies of which trust indenture, amendment dated June 17, 1970 and paper writing dated April 20, 1976 (collectively the "Indenture") are attached hereto as Exhibit B.

E. By virtue of the Will of William duPont, Senior, his real estate in Orange County and the improvements thereon, known as "Montpelier", became, on September 4, 1983, the date of Decedent's death, the property of Henry E. I. duPont, John E. duPont, William duPont III, Evelyn duPont Donaldson and Jean Ellen duPont Shehan. By virtue of the Will of William duPont, Senior, his tangible personal property located at Montpelier at the time of his death also became the property of his five grandchildren at the date of Decedent's death.

F. On January 6, 1984, plaintiffs in the Virginia Action commenced the Virginia Action in the Virginia Court, seeking certain relief, as is more fully set forth in the pleadings in the Virginia Action.

G. On July 27, 1984, Henry E. I. duPont and John E. duPont filed a bill of complaint in equity, being Chancery No. E 84-164, requesting that an issue *devisavit vel non* be made up and tried by a jury at the bar of the Virginia Court, to ascertain whether the paper writings dated February 6, 1975, April 20, 1976, and January 22, 1981, referred to above as having been admitted to probate on September 8, 1983, are truly the last will and testament of Decedent (the "Will Contest Suit").

H. On January 6, 1984, plaintiffs in the Virginia Action commenced the Delaware Action in the Delaware Court, seeking a construction of certain provisions of the Indenture and for other relief, as is more fully set forth in the pleadings in the Delaware Action, including a determination that Article Two(d) of Decedent's Will does not constitute any effective or lawful amendment to the Indenture.

I. On or about June 26, 1984, Marion duPont McConnell and others commenced Civil Action No. 7673 in the Delaware

Court seeking a determination of the proper income beneficiaries of the 1984 income of the Decedent's Trust and for other relief (the "McConnell Suit").

J. Some of the issues raised by the pleadings in the Virginia and Delaware Actions are interrelated as involving both the Will and the Indenture. Therefore, the parties hereto desire that this Agreement be filed of record in both the Virginia and Delaware Courts so that the agreement of the parties to all of the suits described above will be recorded even though the plaintiffs in the Delaware Action are plaintiffs or interveners in the Virginia Action, and even though the defendant in the Delaware Action, Delaware Trust Company, Trustee, is also an intervener in the Virginia Action.

K. The parties in the Virginia and Delaware Actions, the Will Contest Suit, and the McConnell Suit, after thoroughly analyzing the facts, circumstances, and law relating to their respective positions, desire fully and finally to resolve any and all asserted and unasserted claims, cross-claims, demands, and causes of action, heretofore arising, in connection with or relating to the Decedent's Will and Indenture, except (a) in the Virginia Action, any issues of expenses, including attorneys' fees, described in Article VIII, C, 1 below, and (b) in the Delaware Action, the adopted children issue, as defined in Article VI, A below.

L. The parties hereto believe that it is to their advantage and best interests to settle, compromise, and fully and finally resolve all the controversies and disputes raised, or which could have been raised, by the pleadings in the Virginia and Delaware Actions, the Will Contest Suit and the McConnell Suit, by agreeing to certain terms and conditions, and by further agreeing that the Estate and Trust be administered in accordance with the provisions of Decedent's Will and of the Indenture, except where the parties' interests therein are modified by the terms and conditions of this Agreement, in order to avoid the uncertainties of litigation, prevent delay in the settlement of Decedent's Estate and in the administration of Decedent's Trust, and to save time, effort and money. The

parties to this Agreement who are family members desire to settle and compromise said controversies and disputes in order to promote family harmony.

M. On July 6, 1984, Jean Ellen duPont Shehan transferred her interest in Montpelier to the National Trust for Historic Preservation in the United States ("National Trust"). On July 25, 1984, William duPont III and Evelyn duPont Donaldson transferred their interests in Montpelier to National Trust. Prior to such transfers Jean Ellen duPont Shehan, William duPont III and Evelyn duPont Donaldson had made no voluntary transfer of their interests in Montpelier other than the lease with the Executors dated September 23, 1983.

N. Henry E. I. duPont and John E. duPont have agreed to transfer their interests in Montpelier to National Trust in accordance with the terms of Article III hereof and of a certain written agreement among National Trust, Henry E. I. duPont (and Martha Ann Caroline Verge duPont) and John E. duPont, which agreement has been executed and delivered contemporaneously with the execution and delivery of this Agreement (the "National Trust-duPont Agreement").

O. The parties hereto will request that the Virginia and Delaware Courts approve this Agreement; that the Virginia Court enter a Decree upon the basis of this Agreement substantially in the form annexed hereto as Exhibit C; and that the Delaware Court on the basis of this Agreement and the Decree of the Virginia Court enter Decrees substantially in the form annexed hereto as Exhibits D and G.

P. Montpelier is significant in American history and culture. An original structure was built by James Madison's father in 1756. James Madison, who died in 1836, the fourth President of the United States, lived part of his life there. James Madison and his wife are buried at Montpelier. From 1836 to 1900, Montpelier, including the Mansion in its then form, became the property successively of some eight owners. It was purchased in 1900 by William duPont, Senior, who repaired, renovated and considerably enlarged the Mansion.

Decedent lived at Montpelier until her death on September 4, 1983, and Montpelier has been a duPont family residence for more than eighty-three (83) years.

Q. National Trust is a charitable, educational and non-profit organization created by Congress. The purposes of National Trust are to acquire, preserve and administer sites, buildings, and objects of significance in American history and culture and to preserve and administer gifts of money, securities and other property for the purpose of carrying out the preservation program as set forth in the Act of August 21, 1935, as amended, 16 U.S.C. §§461, *et seq.*; and to execute such other functions as are vested in it by 16 U.S.C. §§468 to 468d.

* * *

VI. THE ADOPTED CHILDREN ISSUE

A. *The Adopted Children Issue in the Delaware Action.* The "adopted children issue" as used herein means the claim embodied in Count IV of the Delaware Action. The adopted children issue is not being settled or compromised by this Agreement or the Decrees to be entered by the Virginia and Delaware Courts, but the adopted children issue may be asserted in the new Delaware Action, as provided in paragraph B below.

B. *The New Delaware Action.* The parties to this Agreement who are plaintiffs in the Delaware Action, or some of them, shall have a right to file, by January 1, 1985 and not thereafter, a new and separate suit in the Delaware Court raising the adopted children issue (the "new Delaware Action"). No statute of limitations or laches defense shall be applicable to bar any such new Delaware action if such action is commenced prior to January 1, 1985.

C. *The Will Provision As To Adopted Children.* The parties agree that the provisions of Decedent's Will with respect to adopted children are enforceable. However, the provisions of this paragraph shall not in any way prejudice the rights of

the plaintiffs in the Delaware Action, or some of them, to file the new Delaware Action referred to in paragraph B above, asserting the adopted children issue, or have any prejudicial effect on the merits of the new Delaware Action, it being recognized that, if inconsistent positions as to the adopted children issue have been taken in this Agreement by the plaintiffs in the Virginia and Delaware Actions as to the Will as contrasted with the Indenture, such inconsistent positions have been taken simply for the purpose of effecting a settlement and compromise.

* * *

VII. PAYMENT OF TRUST INCOME

A. *Trust Indenture Provision Interpreted.* That portion of Section II, paragraph 2(a) of the Amendment to the Indenture dated June 17, 1970 which provides that "[a]ny income not distributed on an annual basis shall be added to and become part of the principal of the trust" is interpreted by the provisions of this Article.

B. *Definition of "Fiscal Year" and "Annual Basis".* The fiscal year of the Trust begins on September 1 and ends on August 31. Any income not distributed during any such fiscal year shall be added to and become part of the principal of the Trust, but the term "distributed" and "distribution" shall mean actual payment by the Trustee to a beneficiary or to an escrow account established by the Trustee, as hereinafter provided, during any fiscal year, or within sixty-five (65) days after the end of any fiscal year on August 31.

C. *Class A and Class B Beneficiary 1984 Income.* After the entry of Decrees in the Virginia and Delaware Actions and within sixty-five (65) days after August 31, 1984, the Trustee shall divide the net income of the Trust accumulated during its fiscal year ending August 31, 1984 (the "1984 Income") into two equal parts, one part designated as "Class A Beneficiary 1984 Income" and the other part designated as "Class B Beneficiary 1984 Income".

D. *Division of Class A Beneficiary 1984 Income.* The

Trustee shall further divide the Class A Beneficiary 1984 Income into twenty (20) equal shares, and allocate one (1) share to each Class A Beneficiary who is not an adopted child, namely, the following:

Children of Henry E. I. duPont

Deborah duPont Pries
Henry Laurence duPont
Harriet Nicole duPont
Beverly Austin duPont
William Henry duPont, Jr.
Sophie Madeleine duPont
Henry E. I. duPont, II

Children of Evelyn duPont Donaldson

Judith D. Jordan
Linda D. Donaldson
Charlotte A. D. Maher
Elise D. Bulger

Children of Jean Ellen duPont Shehan

Marion duPont McConnell
Susan McConnell Rinehart
James H. T. McConnell, Jr.

Child of William duPont III

William duPont IV

E. *Allocation to Adopted Children.* The Trustee shall allocate the five (5) remaining shares of Class A Beneficiary 1984 Income to the following adopted children of Henry E. I. duPont:

Adopted Children of Henry E. I. duPont

Henri Verge duPont
Martha Anne Caroline duPont
Christopher Hans Schneider
William Garey Schneider
Catherine duPont Schlaeppi

F. *Division of Class B Beneficiary 1984 Income.* The

Trustee shall further divide the Class B Beneficiary 1984 Income into seventeen (17) equal shares, and allocate one (1) share to each Class B Beneficiary who is not an adopted child or the natural child of an adopted child, namely, the following:

Children of Deborah duPont Pries

William Laurence duPont Melick
Benjamin Pries
Christopher John Pries

Children of Henry Laurence duPont

Laurence duPont
Jennifer Ann duPont
Jason Joseph duPont

Children of Judith D. Jordan

Jennifer A. McClellan
Erica B. McClellan
Matthew B. McClellan

Children of Charlotte A. D. Maher

Hilary L. Maher
Meredith Snow Maher

Children of Elise D. Bulger

Jordan N. H. Bulger
Andrew B. Bulger
Adam C. Bulger

Children of Susan McConnell Rinehart

Stephanie Marion Rinehart
Caroline Tyler Rinehart

G. *Allocation to Child of Adopted Child.* The Trustee shall allocate the one (1) remaining share of Class B Beneficiary 1984 Income to the following natural child of an adopted child:

Child of Catherine duPont Schlaeppi

Elizabeth Ansley Schlaeppi

H. *Payment of Class A and Class B Beneficiary 1984 Income.* After the entry of the Decrees in the Virginia and Delaware actions, and within sixty-five (65) days after August 31, 1984, and after the delivery of the deeds from escrow by the Virginia Court as Escrowee to National Trust in accordance with Article III hereof, the Trustee shall pay the allocated shares, together with the net income earned on such shares, to each Class A Beneficiary and to each Class B Beneficiary who is not an adopted child or child of an adopted child, that is, the Trustee shall distribute the fifteen (15) allocated shares of Class A Beneficiary 1984 Income, and the sixteen (16) allocated shares of Class B Beneficiary 1984 Income, and such beneficiaries (together with all afterborn natural Class A and Class B beneficiaries) shall be eligible for, but not necessarily entitled to, income distributions in all subsequent fiscal years of the Trust in accordance with the terms of the Indenture.

I. *Adopted Children Shares To Be Held in Escrow.* After the entry of the Decrees in the Virginia and Delaware Actions, and within sixty-five (65) days after August 31, 1984, and after the delivery of deeds by the Virginia Court as Escrowee to National Trust, in accordance with Article III hereof, the Trustee shall distribute and pay the five (5) shares of Class A Beneficiary 1984 Income allocated for Henri Verge duPont, Martha Anne Caroline duPont, Christopher Hans Schneider, William Garey Schneider and Catherine duPont Schlaeppi and the one (1) share of Class B Beneficiary 1984 Income allocated for Elizabeth Ansley Schlaeppi (less any taxes or expenses properly allocable to such shares as hereafter provided) to Delaware Trust Company as escrow agent ("escrow agent"), which shall hold such shares (and all income thereon and accretions thereto) in a single, separate escrow account (i) until January 1, 1985 if the new Delaware Action has not been commenced prior thereto, or, if the new Delaware Action is commenced prior thereto, (ii) until it is finally, judicially determined in such action whether such adopted children (and their children) are beneficiaries of the Trust, or until

such action is otherwise terminated, and which shall then pay out such escrowed shares in accordance with paragraph J or paragraph K hereof. The escrow agent shall invest such escrow account in high quality, short-term investments, including but not limited to, United States government obligations, certificates of deposit, commercial paper, bankers' acceptances, repurchase agreements and money market funds.

J. *Distribution Upon Determination Favorable To The Adopted Children.* In the event there is a final judicial determination (including the determination of the appellate courts) of the adopted children issue in the new Delaware Action in favor of the adopted children, the escrow agent shall pay the adopted childrens' allocated shares of the 1984 income and the share of the 1984 income of a child of an adopted child (together with the net income earned on such shares less any taxes or expenses properly allocable to such shares as hereafter provided) to each such adopted child or child of an adopted child (or their estates), and each such adopted child and the child of such adopted child shall be eligible for, but not necessarily entitled to, income distributions in all subsequent fiscal years of the Trust, in accordance with the terms of the Indenture.

K. *Distribution Upon Events or Determination Adverse To The Adopted Children.* However, if the new Delaware Action is not commenced by January 1, 1985, or if it is commenced and there is a final, judicial determination (including the determination of the appellate courts) of the adopted children issue in the new Delaware Action adverse to the adopted children, or the Delaware Action is otherwise terminated as to that issue, the five (5) allocated shares of Class A Beneficiary 1984 Income, (together with the net income earned on such shares being held by the escrow agent less any taxes or expenses properly allocable to such shares as hereafter provided) shall be divided in equal shares and paid to those Class A Beneficiaries (or their estates) receiving distributions under paragraph H above, and the one (1) allocated share of Class B Beneficiary 1984 Income (together

with the net income earned on such share being held by the escrow agent less any taxes or expenses properly allocable to such share as hereafter provided) shall be divided in equal shares and paid to those Class B Beneficiaries (or their estates) receiving distributions under paragraph H above.

L. *Similar Segregation of Income In Future Fiscal Years.* If the new Delaware Action is commenced by January 1, 1985, then following each future fiscal year of the Trust during which there is no final judicial determination (including the determination of the appellate courts) of the adopted children issue, or during which the issue has not been otherwise terminated in the new Delaware Action, the Trustee shall, similarly, distribute and pay into a single, separate escrow account held by the escrow agent a share of net income of the Trust (less any taxes or expenses properly allocable to such shares as hereafter provided), for each of the then living adopted children and children of adopted children if in any such future fiscal year the Trustee has exercised its discretion in favor of distribution of income to natural Class A or Class B Beneficiaries. Upon a final judicial determination (including the determination of the appellate courts) of the adopted children issue in the new Delaware Action, or if the new Delaware Action is otherwise terminated as to that issue, the escrow agent shall distribute all such shares of adopted children and shares of children of adopted children being held in escrow in the manner specified in paragraph J or paragraph K hereof. In distributing such shares to the escrow agent and to the ultimate beneficiaries, the Trustee and the escrow agent, respectively, shall treat each fiscal year separately for determining the applicable number of shares of natural and adopted children. If the new Delaware Action is not commenced by January 1, 1985, then the Trustee shall thereafter distribute income in such manner as it may determine in the exercise of its discretion only among the natural issue of the children of William duPont, Junior.

M. *Taxes and Expenses of Shares Distributed To The Escrow Account.* From the shares set aside by the Trustee for

distribution to the escrow agent and from the shares held by the escrow agent, the Trustee and the escrow agent, respectively, shall pay taxes due on account of such shares or the income on such shares, reasonable fees for its services as Trustee or escrow agent and all other reasonable expenses properly incurred on account of such shares or income on such shares.

* * *

COUNT IV: THE IMPROPER EXCLUSION OF ADOPTED CHILDREN AS BENEFICIARIES OF THE TRUST OF MARION duPONT SCOTT

65. The allegations of paragraphs 1 through 64 above are incorporated herein by reference as though set out at length.

66. Section II(4) of the first Amendment to the Trust Indenture of Marion duPont Scott, dated June 17, 1970, provides that reference to "grandnieces and grandnephews and great grandnieces and grandnephews" and "issue of great grandnieces and grandnephews" shall mean "lawful blood descendants of William duPont, Junior", provided, however, that an "adopted child and such adopted child's lawful blood descendants shall not be considered as lawful blood descendants of the adopting parent or parents or of anyone who is an ancestor of the adopting parent."

67. *The law of the State of Delaware,* as provided in 13 Del. C. §919, is that upon the issuance of a decree of adoption the adopted child "shall be considered the child of the adopting parent or parents", entitled to the same rights and privileges and subject to the same duties and obligations as if he or she had been born in wedlock to the adopting parent or parents.

68. *The law of the State of Delaware,* as provided in 13 Del. C. §920, is that upon the issuance of a decree of adoption the adopted child shall acquire the right to inherit from its adoptive parent or parents and from the collateral or lineal relatives of such adoptive parent or parents. While §920 provides that every person shall have the right to provide for the disposition of his or her property by will, payments of income and principal by the Trustee of the Trust of Marion duPont Scott did not constitute a disposition by Marion duPont Scott of her property by will, and this provision of §920 is inapplicable.

69. Section IV(2) of the Trust Indenture of Marion duPont Scott provides that all questions pertaining to the construction or validity of the Trust Indenture shall be governed

by the law of the State of Delaware. The law of Delaware as to adopted children, embodied in 13 Del. C. §919 and 920 referred to above, was thus made controlling by Marion duPont Scott in the construction and interpretation of her Trust Indenture, and the laws and public policy of the State of Delaware prevail over any contrary provision in the Trust Indenture of Marion duPont Scott.

70. Section II, paragraph 4 of the first Amendment to the Trust Indenture of Marion duPont Scott dated June 17, 1970 provides that an adopted child and such adopted child's lawful blood descendants shall not be considered as lawful blood descendants of the adopting parent or parents. However, under 13 Del.C. §919 and §920, which provisions are made controlling by Section IV(2) of the Trust Indenture of Marion duPont Scott in construction of the Trust Indenture, the adopted children of plaintiff Henry E. I. duPont should be deemed "lawful blood descendants" of plaintiff Henry E. I. duPont, as defined in the Trust Indenture of Marion duPont Scott.

71. Plaintiffs Catherine duPont Schlaeppi, William Garey Schneider, Christopher Hans Schneider, Martha Ann Caroline duPont, and Henry Verge duPont, the adopted children of plaintiff Henry E. I. duPont, are entitled to distributions of income and principal from the Trust of Marion duPont Scott equally with their brothers and sisters, the natural children of plaintiff Henry E. I. duPont.

* * *

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

CATHERINE DUPONT SCHLAEPPI, ET AL.,	)	
	)	No. 327, 1986
Plaintiffs Below, Appellants,	)	
	)	Court Below: Court of Chancery of the State of Delaware in and for New Castle County C.A. No. 7898
v.	)	
DELAWARE TRUST COMPANY, TRUSTEE UNDER A TRUST INDENTURE WITH MARION DUPONT SCOTT, DECEASED, DATED JUNE 17, 1960,	)	
Defendant Below, Appellee.	)	

Submitted: March 10, 1987
Decided: March 13, 1987

Before MOORE, WALSH and HOLLAND, Justices.

ORDER

This 31st day of March, 1987, it appearing that:

1) The Appellants have moved for an Order staying the issuance of the mandate until April 27, 1987 on the ground that they intend to file a petition for a writ of certiorari in the Supreme Court of the United States seeking review of this Court's Order of March 13, 1987, affirming the judgment of the Court of Chancery.

2) The Appellee, Delaware Trust Company (the Bank), opposes the stay, but recognizes that it has been put on notice of Appellants' intention to pursue this litigation, and as a trustee it cannot risk distributing the funds claimed by the Appellants until all litigation has been terminated. Thus, the Bank acknowledges that the effect of Appellants' announced

intention to seek review in the Supreme Court of the United States secures for them a *de facto* stay irrespective of this Court's decision on Appellants' formal motion to stay issuance of the mandate.

3) Pursuant to 28 U.S.C. § 2101(f), the Bank, therefore, has requested this Court to protect the interests of those persons now determined to be rightful beneficiaries of the trust by requiring the Appellants to post a bond in the sum of $1,279,075.00, representing the present value of the trust shares held by the Bank and claimed by Appellants.

4) The Appellants oppose the Bank's application for the reasons stated in their reply dated March 30, 1987.

NOW, THEREFORE, pursuant to 28 U.S.C. § 2101(f), IT IS ORDERED that:

1) Subject to the posting of a secured bond in the amount of $250,000 on or before Monday, April 6, 1987 by 3:00 p.m., issuance of the mandate is stayed to and including Monday, April 27, 1987.

2) The bond shall be fully secured by cash, corporate surety, or an irrevocable letter of credit from a bank doing business in the State of Delaware. The bond shall be conditioned that if the Appellants fail to make application for a writ of certiorari on or before Monday, April 27, 1987, or fail to obtain an order granting said application, or fail to make their plea good in the Supreme Court of the United States, they shall answer to the Bank and the rightful beneficiaries for all damages and costs which the same may sustain by reason of the stay.

3) As a further condition of the stay, the form and sufficiency of the bond and security shall first be approved by a Justice of this Court.

4) Upon the filing of a petition for a writ of certiorari in the Supreme Court of the United States, and provided that the bond has been posted in accordance with this Order, the stay of the mandate shall continue until final disposition of the matter by the Supreme Court of the United States.

5) Upon the filing of a copy of an order of the Supreme Court of the United States, denying the Appellants' petition for a writ of certiorari, the mandate shall issue forthwith.

BY THE COURT:

/s/ G. T. MOORE II
Justice

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 919 and 920 of Delaware's adoption statute, 13 *Del. C.* §901 *et seq.*, provide, as follows:

§919. General effect of adoption.

(a) Upon the issuance of the decree of adoption, the adopted child shall be considered the child of the adopting parent or parents, entitled to the same rights and privileges and subject to the same duties and obligations as if he had been born in wedlock to the adopting parent or parents.

(b) Upon the issuance of the decree of adoption, the adopted child shall no longer be considered the child of his natural parent or parents and shall no longer be entitled to any of the rights or privileges or subject to any of the duties or obligations of a child with respect to the natural parent or parents; but, when a child is adopted by a stepparent his relationship to his natural parent who is married to the stepparent shall in no way be altered by reason of the adoption.

§920. Effect of adoption on inheritance.

(a) Upon the issuance of a decree of adoption, the adopted child shall lose all rights of inheritance from its natural parent or parents and from their collateral or lineal relatives. The rights of the natural parent or parents or their collateral or lineal relatives to inherit from such child shall cease upon the adoption.

(b) Upon the issuance of a decree of adoption, the adopted child shall acquire the right to inherit from its adoptive parent or parents and from the collateral or lineal relatives of such adoptive parent or parents, and

the collateral or lineal relatives of the adoptive parent or parents shall at the same time acquire the right to inherit from the adopted child.

(c) Nothing contained in this section shall limit in any way the right of any person to provide for the disposition of his or her property by will. The rights of a child adopted after the making of a will by the adopting parent or parents shall be the same as the rights of an after-born child, as prescribed in §301 of Title 12. When the adopting parent is a stepparent, married to a natural parent, nothing contained in this section shall affect the rights of inheritance between the child and its natural parent or their collateral or lineal relatives.

Supreme Court, U.S.
FILED
JUL 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1962

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA
OCTOBER TERM, 1987

CATHERINE duPONT SCHLAEPPI, *et al.*,
Petitioners,

v.

DELAWARE TRUST COMPANY, *Trustee under a Trust Indenture with MARION DUPONT SCOTT, deceased, dated June 7, 1960, and amended on June 17, 1970,*
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF IN OPPOSITION AND APPENDIX

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July 10, 1987

SMITH-EDWARDS-DUNLAP COMPANY, 2967 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 425-8800

QUESTIONS PRESENTED

Pursuant to Supreme Court Rule 34.2, respondent Delaware Trust Company ("Delaware Trust") here restates the questions presented which are inaccurately stated in the petition for a writ of certiorari (Pi).*

1. Whether Mrs. Scott's individual act of executing a private trust agreement, which defines her beneficiaries in a manner that unambiguously excludes all adopted persons, is transformed into "state action" under the Fourteenth Amendment where the State of Delaware neither encouraged Mrs. Scott to exclude adopted persons nor has any role in the administration of the trust, and where the Delaware courts did not affirmatively enforce the trust agreement at the behest of Delaware Trust, the trustee, but merely refused petitioners' demand to rewrite Mrs. Scott's trust to include adopted persons?

2. Whether the Delaware rule presuming adopted persons to be included within a class of trust beneficiaries but permitting the settlor, by use of clear and unambiguous language in the trust instrument, to exclude adopted persons warrants the Court's attention where (a) the Court is traditionally deferential to the States' regulation of post-mortem dispositions of property, (b) historically, adopted persons have not been stigmatized on account of their status, (c) the Delaware rule permits settlors to maintain their testamentary freedom of choice and to prevent unanticipated dilutions of their estates, and (d) the Delaware rule does not allow adopted persons to be more readily excluded than natural persons?

3. Whether this Court has jurisdiction to review the determination of the Delaware Supreme Court that a trust settlor has the right *under Delaware law*, upon an expression of clear and unambiguous intent, to exclude adopted persons from the class of trust beneficiaries where that determination is based solely upon the Delaware Supreme Court's inter-

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*Throughout this response, the petition for a writ of certiorari is cited as "P __," petitioners' appendix is cited as "__a," and Delaware Trust's appendix is cited as "__b."

pretation of the Delaware statute defining the rights and obligations of adopted children?

Even if the Court were to decide the first two questions in favor of petitioners, the result below would not change because the judgment of the Delaware Supreme Court rests upon independent and adequate grounds of Delaware law. Before the Court even addresses the petitioners' first two questions, the petition must be denied if the following question, which is misleadingly omitted from the petition, is answered in the negative:

4. Whether the judgment of the Delaware Supreme Court, which is based on (a) Mrs. Scott's exercise of her right under Delaware law to exclude adopted persons and (b) the res judicata effect under Delaware law of the Delaware Decree upon all claims not "embodied in Count IV of the Delaware Action," would be modified in any respect by a decision of this Court disagreeing with the Delaware Supreme Court's analysis of the Fourteenth Amendment issues?

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Rule 28.1 Listing of Parents, Subsidiaries and Affiliates

Delaware Trust Company does not presently have a parent corporation or any affiliate corporations. All subsidiaries of Delaware Trust Company are wholly owned by it. However, on May 21, 1987 Delaware Trust Company entered into an Agreement of Reorganization and Merger by which it will become a wholly-owned subsidiary of Meridian Bancorp, Inc., of Reading, Pennsylvania, after January 1, 1988.

STATEMENT OF THE CASE

The petition for certiorari now before the Court is the latest installment in the seemingly endless litigation instituted by petitioners (hereinafter, the "plaintiffs") to insinuate themselves as beneficiaries of a 1960 inter vivos trust agreement (the "Trust") between Marion duPont Scott ("Mrs. Scott") and Delaware Trust, notwithstanding Mrs. Scott's unambiguous language excluding all adopted persons (such as plaintiffs) as beneficiaries of the Trust. Plaintiffs improperly seek to have the court review issues of Delaware law that were decided by two Delaware courts, including whether Mrs. Scott had, and exercised, the right *under Delaware law* to exclude adopted persons. Plaintiffs also claim that the judgments of the Delaware courts, which have the effect of excluding adopted persons as Trust beneficiaries, amount to a denial of plaintiffs' equal protection rights under the Fourteenth Amendment.

The dispute has its origins in Mrs. Scott's June 17, 1970 amendment (47a-53a) to her Trust (39a-46a). Having no children herself, Mrs. Scott designated the beneficiaries of her Trust to consist of her grandnieces and grandnephews, and great grandnieces and great grandnephews (49a-50a). In the same 1970 amendment Mrs. Scott made clear that her beneficiaries were limited to the "lawful blood descendants" of her brother, William duPont, Jr.; Mrs. Scott expressly excluded adopted children from the class of "lawful blood descendants":

> An adopted child and such adopted child's lawful blood descendants shall not be considered as lawful blood descendants of the adopting parent or parents or of anyone who is an ancestor of the adopting parent. (52a).

In 1967, one of Mrs. Scott's nephews, Henry E. I. duPont, married Martha Ann Caroline Verge Schneider, who had five children that were born during her prior marriage: Catherine duPont Schlaeppi (née Schneider), William Garey Schneider, Christopher Hans Schneider, Martha Ann Caroline duPont (née Schneider) and Henry Verge duPont (née Schneider) (19a). Henry E. I. duPont, already having five natural children

of his own, adopted all five of his wife's children, pursuant to Delaware adoption laws (*Id.*). Three of such children were adopted before Mrs. Scott, in 1970, amended her Trust to exclude adopted children as beneficiaries (19a-20a).

After Mrs. Scott died on September 4, 1983, Henry E. I. duPont and all of his adult and minor children and grandchildren (who, including the five adopted children, amounted to nineteen persons altogether) brought two wide-ranging, concurrent actions against Delaware Trust, one in the Court of Chancery of the State of Delaware (the "Delaware Action") and the other, also against Mrs. Scott's executors and other interested parties, in the Circuit Court of Orange County in the Commonwealth of Virginia (the "Virginia Action").

The Delaware Action contained multiple counts attacking the validity of the Trust and challenging the apparent effect of Mrs. Scott's Will upon her Trust. One such count, known as Count IV, alleged that Mrs. Scott's exclusion of adopted children violated Delaware law and public policy (67a-68a).

The Virginia Action differed from the Delaware Action in that it was principally an attack on Mrs. Scott's testamentary capacity and various features of her Will (which had been admitted to probate in Virginia) including her charitable bequest to the National Trust for Historic Preservation for purposes of purchasing and preserving her home, Montpelier, which had once been the home of President James Madison.

After prolonged negotiations, all of the adult parties executed the October 15, 1984 Agreement of Settlement (the "Settlement Agreement") to bring an end to the Virginia Action, the Delaware Action and a separate, related action in the Delaware Court of Chancery. Thereafter, the Virginia and Delaware courts both approved the Settlement Agreement and entered separate final decrees (the "Virginia Decree", 1b-11b, and the "Delaware Decree", 12b-15b).

The Settlement Agreement and the decrees implementing the Settlement Agreement were intended (with two exceptions) to result in a full and final adjudication of all claims relating to Mrs. Scott's Trust and Will (14b, 2b-3b, 6b). The

only pertinent exception, in Article VI of the Settlement Agreement, permitted the plaintiffs to commence a new action in Delaware limited to the so-called "adopted children issue":

> (A) *The Adopted Children Issue in the Delaware Action*. The "*adopted children issue*" as used herein means *the claim embodied in Count IV of the Delaware Action*. The adopted children issue is not being settled or compromised by this Agreement or the Decrees to be entered by the Virginia and Delaware Courts, but the adopted children issue may be asserted in the new Delaware Action, as provided in paragraph B below.
>
> B. *The New Delaware Action*. The parties to this Agreement who are plaintiffs in the Delaware Action, or some of them, shall have a right to file, by January 1, 1985 and not thereafter, a new and separate suit in the Delaware Court raising *the adopted children issue* (the "new Delaware Action"). No statute of limitations or laches defense shall be applicable to bar any such new Delaware action if such action is commenced prior to January 1, 1985. (Emphasis supplied. 59a).

Paragraph 3 of the Delaware Decree incorporated the provisions of Article VI of the Settlement Agreement and thus restricted the scope of the plaintiffs' new Delaware Action to "the claim embodied in Count IV of the Delaware Action." (14b).

Contrary to the terms of the Settlement Agreement and the Delaware Decree, the allegations of plaintiffs' "new Delaware Action" contained three separate, alternative counts: Mrs. Scott did not intend, factually or legally, to exclude adopted stepchildren (Count I), Delaware law does not permit Mrs. Scott to exclude adopted children (Count II) and any ruling of the Delaware courts enforcing the exclusion of adopted persons amounts to invidious discrimination prohibited by the Fourteenth Amendment. (Count III). Delaware Trust moved to dismiss the amended complaint on the grounds that (a) the res judicata effect of the Delaware Decree

bars Counts I and III of the amended complaint, and (b) although permitted under the terms of the Delaware Decree, Count II fails to state a claim on which relief can be granted.

After briefing and argument, the Court of Chancery, in a memorandum opinion and order dated September 17, 1986, dismissed the amended complaint (16b-30b, reported at 525 A.2d 562). The Court of Chancery first concluded that plaintiffs' Count II was insufficient because "Delaware law . . . does not prohibit settlors from excluding adopted persons from their trusts" (20b) and the language of Mrs. Scott's Trust "is consistent with Delaware case law which permits a settlor to exclude adopted persons from a trust . . ." (*Id.*). As for Count I, the Vice Chancellor determined that its allegations "do not spring from the claim which was preserved by the Settlement Agreement [i.e., Count IV of the Delaware Action]", so it was barred by the doctrine of res judicata (24b). The Vice Chancellor began his analysis of Count III by assuming, *arguendo*, that the plaintiffs' constitutional claim was not subject to the bar of res judicata (24b). He found that Count III failed to state a claim because there is "no discernable basis for a finding of state action" (26b) and, in any event, plaintiffs cannot defeat "the manifest reasonableness of the challenged Delaware rule of law" (28b). The Vice Chancellor concluded his opinion, however, with a broad statement concerning the res judicata effect of the parties' settlement:

> Suffice it to say that my holdings that the claims raised by plaintiffs are barred by *res judicata* are not based on procedural rules or semantics or arcane theories of jurisprudence. Rather, I have barred the claims pursuant to the clear language of the Settlement Agreement which was primarily drafted by plaintiffs' counsel and which both sides agreed to only after protracted arm's-length negotiations. Whatever plaintiffs may now think about the effect of the Settlement Agreement, it is clear that they have gotten what they bargained for. (29b-30b).

On plaintiffs' appeal to the Supreme Court of the State of Delaware, the Supreme Court entered a judgment order on

March 13, 1987 (reported at 523 A.2d 981) affirming the judgment of the Court of Chancery "on the grounds stated in the well-reasoned opinion of the Vice Chancellor." (1a-2a). Plaintiffs' petition for a writ of certiorari seeks review of that judgment order.

SUMMARY OF ARGUMENT

1. The judgment below rests upon two independent and adequate grounds of Delaware law: first, Mrs. Scott had, and exercised, the right to exclude adopted persons as beneficiaries of her Trust; and second, under the doctrine of res judicata, plaintiffs' remaining claims (including their constitutional theory that their exclusion amounts to a denial of equal protection) were barred upon the entry of the Delaware and Virginia Decrees. The Court lacks jurisdiction to review the Delaware courts' analysis of federal issues where the judgment would not be changed even if the federal issues were decided differently.

2. There is no substantial federal issue for the Court to review because Mrs. Scott's individual act of excluding adopted persons as beneficiaries of her private trust is not fairly attributable to the State of Delaware. Given the absence of any "state action", there is no justiciable controversy arising under the Fourteenth Amendment.

3. There are no compelling circumstances in this proceeding to warrant the Court's intervention: first, the Court has traditionally shown great deference toward state regulation of post-mortem dispositions of property; second, as adopted persons, plaintiffs are not members of a class that, historically, has been disadvantaged or stigmatized; third, the Delaware rule allows a settlor to exercise freedom of choice in making post-mortem dispositions and to prevent unanticipated dilutions of his or her estate; and fourth, because Delaware law presumes that a class gift *includes* adopted persons and requires a clear showing of intent to exclude such persons from a trust, Delaware law does not discriminate at all against adopted persons.

ARGUMENT

I. THE JUDGMENT BELOW WAS BASED UPON INDEPENDENT AND ADEQUATE GROUNDS OF DELAWARE LAW, WHICH DEPRIVES THE COURT OF JURISDICTION OVER PLAINTIFFS' CONSTITUTIONAL CLAIMS.

All three of plaintiffs' "Questions Presented" are derived from Count III of plaintiffs' complaint (29a-30a). This was plaintiffs' contention that the Delaware courts' enforcement of Mrs. Scott's Trust amounts to (1) a violation of due process because it results from a misapplication of Delaware law (P25-27), and (2) a violation of plaintiffs' rights to equal protection under the Fourteenth Amendment because the Trust is "invidiously discriminatory" (P13-24). The Court, however, cannot reach either alleged constitutional infirmity because the judgment below rests upon independent and adequate grounds of Delaware law.

A. The Judgment Of The Delaware Supreme Court On The Meaning Of Delaware Law Cannot Give Rise To A Due Process Claim That It Misapplied Delaware Law.

In the Delaware courts plaintiffs argued that 13 Del.C. §919(a), which provides that an adopted child has all the rights and obligations of a natural child, transforms them into the blood descendants of their adoptive father. The effect of Delaware law, they claimed, was to render unlawful Mrs. Scott's exclusion of adopted children from her Trust. When the Vice Chancellor rejected the notion that a settlor is powerless under Delaware law to exclude adopteds (19b-20b), the plaintiffs insisted that they had been denied due process.

The essence of plaintiffs' due process theory is that 13 Del.C. §919(a) has the effect of immutably placing the plaintiffs within their stepfather's bloodline (P27). The Court of Chancery determined, however, that 13 Del.C. §919(a) does not create any such absolute right. In so doing the Vice Chancellor followed an established line of Delaware cases that

holds that 13 Del.C. §919(a) only provides a rebuttable presumption that adopted children be considered as natural children in the construction of trust instruments. This presumption is overcome by a showing in the trust instrument of a clear intent to exclude adopted persons. (20b). *See, e.g., Wilmington Trust Co. v. Chichester*, 369 A.2d 701 (Del.Ch. 1976), *aff'd*, 377 A.2d 11 (Del. 1977); *Jackson v. Riggs Nat'l Bank of Washington, D.C.*, 314 A.2d 178 (Del. 1973).

Plaintiffs similarly complain that they were denied their "day in court" because the Delaware Supreme Court affirmed the lower court's conclusion, based upon its review of Mrs. Scott's Trust alone, that she clearly intended to exclude adopted persons (P22). Although plaintiffs allege that Mrs. Scott actually intended not to exclude adopted persons, the Delaware courts held that such factual claims stated in Count I were barred by the Delaware Decree (24b). Apart from the fact that plaintiffs relinquished their "day in court" when they executed the Settlement Agreement, the refusal of the Delaware courts to entertain plaintiffs' claims about Mrs. Scott's "actual" intent was, implicitly, an application of the well-established Delaware rule that extrinsic evidence of intent is not admissible unless the instrument itself is ambiguous. *Wilmington Trust Co. v. Chichester*, *supra*, 369 A.2d at 709; *Wilmington Trust Co. v. Huber*, 311 A.2d 892, 894-95 (Del.Ch. 1973), *aff'd sub nom. Benz v. Wilmington Trust Co.*, 333 A.2d 169 (Del. 1975).

The fact that the Delaware courts rejected plaintiffs' argument concerning the effect of 13 Del.C. §919(a) does not give rise to any due process claim under the Fourteenth Amendment. The Delaware Supreme Court is the final authority on the meaning of Delaware law. The Court is bound to accept the Delaware Supreme Court's interpretation of 13 Del.C. §919(a) as creating only a rebuttable presumption in favor of adopted persons. The Court, likewise, cannot review the Delaware Supreme Court's decision that Mrs. Scott's factual intent cannot be relitigated or its factual determination that the language of Mrs. Scott's Trust satisfies the requirements of Delaware law for excluding adopted persons. *Hor-*

tonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 488 (1976); *Coleman v. Alabama*, 399 U.S. 1, 9 (1970). The judgment of the Delaware courts that Mrs. Scott had the right under 13 Del.C. §919(a) to exclude adopted persons, and that her Trust clearly and unambiguously expresses her intent to do so, is a judgment based exclusively on Delaware law. The Court has no jurisdiction under the Fourteenth Amendment to determine whether the Delaware courts misapplied Delaware substantive law relating to Mrs. Scott's rights as settlor.

B. Plaintiffs' Equal Protection Claim Is Independently Barred By The Doctrine Of Res Judicata.

Although the Delaware Court of Chancery reached, and rejected, the merits of plaintiffs' equal protection claim (24b-29b), plaintiffs' Count III was dismissed for the additional reason, arising under Delaware law, that it was barred under the doctrine of res judicata. This state law ground is wholly independent of the constitutional issues and is adequate to support the judgment dismissing plaintiffs' Count III.

In the original Delaware Action plaintiffs alleged a claim (known as Count IV) that Mrs. Scott had excluded adopted children from her Trust in violation of the provisions of 13 Del.C. §919(a) (67a-68a). When the Delaware Action was settled, the Settlement Agreement finally resolved all claims except for the "adopted children issue"; the Settlement Agreement defined the "adopted children issue" as "the claim embodied in Count IV of the Delaware Action" (59a-60a). The Delaware Decree approving the Settlement Agreement expressly limited the scope of the present action to the "adopted children issue" as defined in the Settlement Agreement (14b).

The Delaware Supreme Court affirmed the Vice Chancellor's determination that the Delaware Decree imposes the bar of res judicata upon any claim that was not embodied in the allegations of Count IV of the Delaware Action (23b-24b).[1] Plain-

1. Plaintiffs argue (P28-29) that the Delaware courts "took a result-oriented view" when they held plaintiffs to the terms of their settlement and gave broad res judicata effect to the Delaware Decree. Although plaintiffs

tiffs do not contend that the res judicata ruling is dependent upon the constitutional issues, but they insist that res judicata is "not broad enough in itself to sustain the judgment dismissing the complaint" (P28). Although the Vice Chancellor initially assumed, *arguendo*, that res judicata did not bar plaintiffs' constitutional claims, he only put the defense of res judicata to one side so that he could completely dispose of the plaintiffs' constitutional claims on the merits. The Vice Chancellor's opinion (29b-30b) leaves no doubt that he also considered the constitutional claims to be barred by the Delaware Decree. Plaintiffs' complaint had three separate counts. The Vice Chancellor concluded that the *claims* raised by plaintiffs are barred by *res judicata* and that "I have barred the *claims*[2] pursuant to the clear language of the Settlement Agreement" (29b, emphasis added as to "*claims*"). Yet the Vice Chancellor understood that "Count II is not barred by the Settlement Agreement" (19b). Thus, his conclusion that that (plural) "*claims*" are barred demonstrates that he ultimately accepted Delaware Trust's submission that "plaintiffs bargained away their Count I and Count III claims in the prior Settlement Agreement" (18b-19b).[3]

clearly hope the Court will correct the Delaware courts' interpretation of the meaning of the Settlement Agreement and the Delaware Decree, the breadth of the res judicata effect of those instruments is exclusively a question of Delaware law and is not a matter that is within the Court's jurisdiction. *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, *supra*, 426 U.S. at 488; *Coleman v. Alabama*, *supra*, 399 U.S. at 9.

2. Plaintiffs' Appendix incorrectly transcribes the plural "claims" as the singular "claim." Compare 16a with the conclusion of the Vice Chancellor's opinion as officially reported at 525 A.2d at 569 (29b).

3. Even if the Delaware courts had not actually decided whether res judicata bars the plaintiffs' constitutional claims, Delaware Trust is entitled to rely upon res judicata as an independent and adequate state law ground. "It is well accepted . . . that without filing a cross-appeal or cross-petition, an appellee may rely upon any matters appearing in the record in support of the judgment below." *Blum v. Bacon*, 457 U.S. 132, 137, n.5 (1982); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924). This is so even though the argument of appellee or respondent "may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *American Ry. Express Co.*, *supra*, 265 U.S. at 435. Here, of course, Delaware Trust

In short, plaintiffs' petition seeks the Court's review of a Delaware court judgment that rests upon two independent and state law grounds: Mrs. Scott's right under Delaware law to exclude adopteds from her Trust and the res judicata bar of the Delaware Decree upon all of plaintiffs' other claims (including their constitutional claims). The Court's review of the Delaware courts' analysis of the constitutional issues would be purely advisory, having no effect on the Delaware court judgment. Plaintiffs' petition should accordingly be denied. *International Longshoreman's Assn., AFL-CIO v. Davis*, _U.S. _, 106 S.Ct. 1904, 1910 (1986); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

II. THERE IS NO SUBSTANTIAL FEDERAL QUESTION BECAUSE THE DELAWARE COURTS' REFUSAL TO SET ASIDE THE TERMS OF MRS. SCOTT'S TRUST DOES NOT AMOUNT TO STATE ACTION.

Before the Court can consider the merits of plaintiffs' equal protection claim under traditional Fourteenth Amendment analysis, there is a threshold inquiry of whether plaintiffs can properly invoke their Fourteenth Amendment rights in the context of a private, non-charitable trust. This inquiry arises, of course, because the Fourteenth Amendment reaches only the acts of states, not private individuals. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). Unless the alleged infringement of plaintiffs' constitutional rights is "fairly attributable to the State", there can be no resort to the Fourteenth Amendment. *Id.* Where, as here, a plaintiff challenges private conduct, a state can be held responsible under the Fourteenth Amendment only when "it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed

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does not attack the Delaware courts' reasoning but only insists that the res judicata limitations imposed by those courts upon plaintiffs' Count I be imposed equally upon plaintiffs' constitutional claims.

to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). No such state involvement is present with Mrs. Scott's exclusion of adopted persons from her Trust, so plaintiffs' petition raises no substantial federal question for review.

The plaintiffs urge that there is state action in the Delaware Supreme Court's affirmance of the Vice Chancellor's finding that Mrs. Scott had the right under Delaware law to exclude adopted persons as beneficiaries of her Trust (P15-16). In support of their "state action" claim, plaintiffs cite *Palmore v. Sidoti*, 466 U.S. 429 (1984), a case in which a white plaintiff enlisted the aid of a Florida court of deprive the defendant, plaintiff's ex-wife, of custody of their infant child because the defendant's second husband was black. Plaintiffs similarly rely on *Shelley v. Kraemer*, 334 U.S. 1 (1948), in which the Court held that it violated the Fourteenth Amendment for a state court to enforce private agreements excluding persons of a designated race from occupying residential real estate.

Plaintiffs' constitutional authorities have no application, however, to Mrs. Scott's act, as an individual, of excluding adopted person as beneficiaries of her Trust. The Court has implicitly rejected the plaintiffs' notion that an individual cannot discriminate in selecting his or her trust beneficiaries. In *Trimble v. Gordon*, 430 U.S. 762 (1977), the Court found a "fundamental difference" under the Fourteenth Amendment between an individual's disinheritance of an illegitimate child and a state intestacy statute which caused the same result:

> Appellees characterize the Illinois intestate succession law as a "statutory will." Because intent is a central ingredient in the disposition of property by will, the theory that intestate succession laws are "statutory wills" based on the "presumed intent" of the citizens of the State may have some superficial appeal. *The theory proceeds from the initial premise that an individual could, if he wished, disinherit his illegitimate children in this will.* Because the statute merely reflects the intent of those citizens who failed to make a will, discrimination against illegitimate children in intestate succession laws is said to be equally permissible. *The term*

> *"statutory will," however, cannot blind us to the fact that intestate succession laws are acts of States, not of individuals. Under the Fourteenth Amendment this a fundamental difference.* (Emphasis added.)

Id., 430 U.S. at 775, n.16. Similarly, in *Evans v. Newton*, 382 U.S. 296 (1966), Justice Douglas postulated that "[i]f a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered." *Id.*, 382 U.S. at 300. *See also*, *Evans v. Abney*, 396 U.S. 435, 445-46 (1970) (application of neutral state trust laws to terminate charitable trust is not state action where trust settlor, not the state, imposed racial restrictions requiring termination); *Gordon v. Gordon*, 124 N.E.2d 228 (Mass. 1954), *cert. denied*, 349 U.S. 947 (1955); *United States Nat'l Bank v. Snodgrass*, 275 P.2d 860 (Or. 1954).

Plaintiffs' claim of "state action" is not enhanced by the dismissal of their complaint in the Delaware Court of Chancery and the Delaware Supreme Court's affirmance of that result. As the Court's decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948), makes clear, private action is not transformed into state action when "the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit." 334 U.S. at 19. Rather, the salient factor is the "active intervention of the state courts, supported by the full panoply of state power," without which the private discriminations could not be enforced. *Id.*

The undisputed facts of this dispute bear no resemblance to *Shelley v. Kraemer* and its progeny. Delaware Trust neither enlisted the aid of the Delaware Court of Chancery to enforce the Trust's provisions against the plaintiffs nor sought instructions that it can adhere to Mrs. Scott's clear direction excluding adopted persons. If plaintiffs had not timely commenced this action, Delaware Trust would have made distributions of Trust income and assets as Mrs. Scott expressly intended—solely to the blood descendants of William duPont,

Jr. Further, there is no pervasive involvement of the State of Delaware in the administration of the Trust; it is a purely private inter vivos trust in which the Delaware Court of Chancery would have had no role but for the plaintiffs' own self-serving challenges to the validity of the Trust. *Compare*, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972). As the Vice Chancellor correctly noted, this is a case in which the Delaware Court of Chancery (and, in turn, the Delaware Supreme Court) merely abstained from granting relief to the plaintiffs, leaving Mrs. Scott free to impose such discrimination as she saw fit. (26b). The refusal of the Delaware courts to intervene in the affairs of Mrs. Scott's private trust does not constitute state action, so plaintiffs' petition for a writ of certiorari does not implicate any federal question, let alone a substantial federal question, for the Court's review.

III. CERTIORARI IS NOT APPROPRIATE IN THIS CASE BECAUSE PLAINTIFFS' CLAIM LACKS IMPORTANCE AND MERIT IN ANY EVENT.

Plaintiffs preface their argument with the suggestion that their petition offers the Court "an opportunity to define the constitutional status of adopted children and to establish a minimum standard under the Fourteenth Amendment" for protecting the rights of adopteds under statutes such as 13 Del.C. §919(a). (P14-15). However, there is no sound reason for the Court to take the plaintiffs up on this "opportunity." Indeed, the Court should be especially reluctant to intervene in the Delaware courts' determination of rights arising under Mrs. Scott's Trust, because "[t]he orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual states." *Trimble v. Gordon*, 430 U.S. 762, 771 (1977).

A. Plaintiffs, As Adopted Children, Do Not Fall Within A "Quasi-Suspect" Classification.

Plaintiffs urge the Court to determine that adopted persons are members of a "quasi-suspect" classification so that any discrimination based upon adoption should be subject to height-

ened scrutiny (P16-19). Although the Court has not determined whether adopted persons are within a suspect or "quasi-suspect" classification, a number of lower federal courts have decided that they are not. For example, in *Rodriguez v. Sec'y of Health, Education and Welfare*, 644 F.2d 918 (1st Cir. 1981), the First Circuit upheld a provision of the Social Security Act that treated natural children more favorably than adopted children. The court reasoned that the distinctions as to adopted persons did not involve "any inherently suspect classification," 644 F.2d at 920, and that the Act was entitled to "a strong presumption of constitutionality," 644 F.2d at 921, which the plaintiffs had not overcome by showing that it bore no rational relationship to a legitimate governmental interest.[4] *Accord*, *Holbrook v. Califano*, 636 F.2d 157, 159 (6th Cir. 1980); *Clayborne v. Califano*, 603 F.2d 372, 378 (2d Cir. 1979). The reason, of course, is that "[t]he status of being adopted has not historically been a focus of discrimination; it causes no enduring social stigma, it has never limited access to the electoral process." *Williams v. Mathews*, 441 F.Supp. 1045, 1049 (E.D.La. 1977), *aff'd sub nom. Williams v. Califano*, 566 F.2d 1044 (5th Cir. 1978), *cert. denied*, 439 U.S. 821 (1978).

B. There Is No Need For The Court To Intervene In This Private Dispute Because 13 Del.C. §919(a), As Applied By The Delaware Courts, Serves Legitimate State Interests And Does Not Treat Adopted Persons Unfavorably.

Given the presumption of constitutionality that attaches to 13 Del.C. 919(a), plaintiffs have the impossible burden of showing that the statute, as interpreted, bears no rational relationship to a legitimate state interest. *Rodriguez v. Sec'y of Health, Education & Welfare*, *supra*, 644 F.2d at 921. But as the Delaware courts correctly discerned, there are several legitimate interests that are served by the principle of Delaware law that a settlor has

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4. The First Circuit in *Rodriguez* also found that distinctions involving adopted persons did not "impose a burden on the exercise of any fundamental right" (644 F.2d at 920-21), contrary to plaintiffs' unsupported statement that this case involves "the most sensitive kinds of personal rights" (P16).

the right to reject the presumption that adopted persons are participants in a class of "descendants" or "issue."

Fundamentally, the rule permits a settlor such as Mrs. Scott to dispose of her wealth in the manner she deems most appropriate (28b). Plaintiffs' constitutional theory—that adopted persons *cannot* be excluded as a class—would unnecessarily infringe on a settlor's freedom of choice in making post-mortem dispositions, to which the States have traditionally shown great deference. *See, e.g., DuPont v. Equitable Security Trust Co.*, 122 A.2d 429, 439 (Del. 1956) ("a settlor may be as capricious as he likes, provided his intent is clear.")

In addition, the rule permits a settlor to protect trust assets from being diluted by unanticipated adoptions into the class of beneficiaries (28b). If Mrs. Scott could only exclude adopted persons by name or specific description, it would be possible for countless persons adopted after Mrs. Scott's death, who are not so named or described in the Trust, to join the class of "lawful blood descendants of William duPont, Jr."[5]

The Delaware rule not only serves legitimate interests of the State, on closer analysis it does not discriminate at all against adopted persons. Delaware law does not prohibit adopted persons from being included as beneficiaries of a trust. On the contrary, under Delaware law adopteds, like natural issue, are presumed to be *included* within the term "descendants." It requires the clear, affirmative act of the settlor to exclude adopted persons from a trust, which is nothing less than would be required of a settlor to exclude natural issue in favor of adopteds.[6] In short, plaintiffs' com-

5. At oral argument before the Delaware Supreme Court, plaintiffs' counsel ventured that the plaintiffs could have been excluded by a specific description ("All of the children of Mr. and Mrs. Henry E.I. duPont now adopted or hereafter adopted by them shall not be beneficiaries of my trust."), but could not coherently answer the Court's inquiry whether such limited language would exclude children adopted by Henry duPont's brothers and sisters (31b). Clearly, it would not.

6. For example, in *Dutra DeAmorim v. Norment*, 460 A.2d 511, 515 (Del. 1983), the Delaware Supreme Court held that the settlor's "deliberate distinction" in her trust evidenced her clear intent to exclude certain of her son's *natural* children from the class of "issue" under her trust.

plaint is not that they are the victims of a State-imposed classification that discriminates against adopted persons. Their real gripe is that Mrs. Scott exercised her personal freedom of choice under a neutral and nondiscriminatory Delaware law to limit the beneficiaries of her Trust to her brother's natural bloodline descendants. Stripped bare of its constitutional raiment plaintiffs' action is nothing more than a private dispute brought for the sole purpose of rewriting the solemn language of Mrs. Scott's Trust. Plaintiffs' petition should accordingly be denied because it presents no issues of importance to anyone but the parties themselves. Supreme Court Rule 17.1(c); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 79 (1955).

CONCLUSION

For the foregoing reasons this Court should deny the plaintiffs' petition for a writ of certiorari to review the decision of the Supreme Court of the State of Delaware.

Respectfully submitted,

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Dated: July 10, 1987

APPENDIX

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IN THE CIRCUIT COURT OF ORANGE COUNTY

HENRY E. I. duPONT, et al. *Plaintiffs* *v.* V. R. SHACKELFORD, JR., Individually and Executor of the Estate of Marion duPont Scott, et al., *Defendants.*	)	Chancery No. E 84-1

DECREE

This 22nd day of October, 1984, came all of the parties to this action and petitioned the Court to enter this Decree upon consideration of the Agreement of Settlement and for the Entry of Decrees ("Agreement"), a copy of which is annexed hereto, between and among all of the parties to this action who are *sui juris*.

IT APPEARING that all of the parties plaintiffs in the captioned action are also parties plaintiffs in that certain action captioned *Henry E. I. duPont, et al. v. Delaware Trust Company*. Civil Action No. 7421 ("Delaware Action") pending in the Court of Chancery of the State of Delaware in and for New Castle County ("Delaware Court");

AND IT FURTHER APPEARING that the parties to the Agreement have agreed therein that this Decree may be entered in accordance with the terms and provisions of the Agreement;

AND IT FURTHER APPEARING that Thomas M. Purcell, Esquire, was appointed Guardian *ad litem* for the minor, natural issue of Henry E. I. duPont; that Thomas J. Province, Esquire, was appointed as Guardian *ad litem* for the unborn natural issue of William duPont, Junior; that Caroline Watts, Esquire, was appointed as Guardian *ad litem* for

Elizabeth Ansley Schlaeppi and for the issue, adopted and natural, of the adopted children of the natural issue of William duPont, Junior; and that Martin J. McGetrick, Esquire, was appointed as Guardian *ad litem* for the minor, natural issue of Jean Ellen duPont Shehan, Evelyn duPont Donaldson and William duPont III, and that the Guardians *ad litem* have filed Answers;

AND, the Court having received reports from the Guardians *ad litem*, and having heard evidence presented in open court and the arguments of counsel, makes the following FINDINGS:

A. The plaintiffs have alleged certain claims against the defendants, as is more fully set forth in the Bill of Complaint filed in this action and in the Complaint, as amended, filed in the Delaware Action. In addition, defendant National Trust for Historic Preservation in the United States ("National Trust") has alleged certain claims against various parties as is more fully set forth in its Cross-Bill filed in this action.

B. Plaintiffs Henry E. I. duPont and John E. duPont have filed a Bill of Complaint for an issue *devisavit vel non* in this Court, Chancery No. E 84-164 ("Will Contest Suit"). The purpose of the Will Contest Suit is to impeach in their entirety the paper writings dated February 6, 1975, dated April 20, 1976, and dated January 22, 1981, admitted to probate on September 8, 1983 in the Office of the Clerk of the Circuit Court of Orange County, Virginia, as the Will and Codicils thereto of Marion duPont Scott ("Will").

C. The purpose of the Agreement is to compromise, settle and resolve any and all claims, cross-claims, demands and causes of action of any nature, either asserted or which could have been asserted, in this action, the Will Contest Suit or in the Delaware Action, or in that certain action captioned *Marion duPont McConnell, et al. v. Delaware Trust Company, as Trustee*, Civil Action No. 7673, pending in the Court of Chancery of the State of Delaware in and for New Castle County (the "McConnell Suit"), or arising in connection with the Will, or the Trust Indenture with Delaware Trust

Company, Trustee, executed by Decedent on June 7, 1960, as amended on June 17, 1970 and April 20, 1976 ("Trust Indenture"), or the administration of the Decedent's Estate and Trust, or the execution of this Agreement, or to the extent that it is performed according to its terms the performance of the Agreement, except for the adopted children issue pending in the Delaware Action as described in the Agreement, which may become the subject of the new Delaware Action, as described in the Agreement, and except for any issues of expenses, including attorneys' fees, described in Article VIII, C, 1 of the Agreement.

D. The Agreement was entered into, subject to the approval of this Court and of the Delaware Court, in good faith, in order to compromise and settle disputed issues; to avoid expensive litigation the defense of which could reduce the value of the Decedent's Estate and of the Trust; to avoid the further prosecution of the Will Contest Suit which, if successful, would destroy the scheme of distribution set forth in the Will, and to preserve harmony among Decedent's family.

E. The Agreement is fair and reasonable, and is in the best interests of the Decedent's Estate and Trust, and their beneficiaries, and should be approved by the Court.

F. Article Two of Decedent's Will contains a charitable bequest of Ten Million Dollars ($10,000,000.00) to National Trust ("Bequest"). Certain provisions of Article Two of the Will concerning the use of the Bequest are ambiguous.

G. The provisions of Article Two of Decedent's Will concerning conformation of the Mansion at Montpelier as nearly as possible with the architectural pattern which existed when the said property was owned by James Madison are precatory in nature.

H. The Will grants discretion to National Trust concerning the use of the Bequest and the restoration, preservation, presentation and operation of Montpelier as an historic site and museum open to the public.

I. Montpelier is significant in American history and culture.

J. National Trust has expertise in preservation matters and the operation of historic sites and museums open to the public.

K. National Trust has acquired or will acquire the interests of William duPont, Senior's grandchildren in the entirety of Montpelier.

L. Under Virginia law, the Attorney General of Virginia has the enforcement responsibility to determine that charitable bequests are properly used.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Court has jurisdiction of the subject matter and of the parties, and has jurisdiction to enter this Decree.

2. The answers filed by the Guardians *ad litem* are made part of the record.

3. The terms and provisions of the Agreement, annexed hereto, are approved and are incorporated by reference into this Decree for all purposes as though set out at length. The action of the Executors of the Decedent's Estate and of the Delaware Trust Company, Trustee under the Trust Indenture, in executing the Agreement is hereby confirmed, ratified and approved. The Executors and the Trustee are hereby relieved of any and all responsibility and liability which they might otherwise have on account of the execution of the Agreement, or to the extent it is performed in accordance with its terms, the performance of the Agreement and the settlement of this action, the Will Contest Suit, the Delaware Action, and the McConnell Suit.

4. The Executors shall administer the Decedent's Estate in accordance with the Will and the provisions of the Agreement, and in the event of any conflict or inconsistency between any provision of the Will and any provision of the Agreement, the relevant provision of the Agreement shall, in

all instances, control the rights and interests of the parties. The Executors are authorized and directed to carry out all steps necessary to implement the Agreement.

5. The Trustee shall administer the Trust in accordance with the provisions of the Trust Indenture and in accordance with the provisions of the Agreement and, in the event of any conflict or inconsistency between any provision of the Trust Indenture and any provisions of the Agreement, the relevant provisions of the Agreement shall, in all instances, control the rights and interests of the parties. The Trustee is authorized and directed to carry out all steps necessary to implement the Agreement.

6. The Agreement shall be binding on the following persons, as though each such person were *sui juris* and had executed the Agreement, and they, or any of them, shall not be entitled in the future to challenge or contest the validity or enforceability of the Agreement, the Will, or the Trust Indenture, or to assert claims or liability against any party to the Agreement on account of that party's execution of the Agreement, or to the extent that it is performed according to its terms, the performance of the Agreement:

(a) the living minor issue and unborn issue of William duPont, Junior; and

(b) the minor present and future adopted children of the issue of William duPont, Junior; and

(c) the issue of the present and future adopted children of the issue of William duPont, Junior; and

(d) the present and future adopted children of the present and future adopted children of the issue of William duPont, Junior.

Notwithstanding the foregoing provision, nothing in this Decree shall be construed to prevent any person listed in subparagraphs (b) to (d) from hereafter raising the question of whether adopted persons and their issue, natural and adopted, can be beneficiaries under the Trust Indenture, but any such claim permitted by this paragraph 6 shall be limited

to income or principal not distributed prior to the filing of any such action against, and service upon, the Trustee.

7. The Executors are authorized to pay the fees of the Guardians *ad litem* from the assets available to the Estate, as approved by the Court; and the Guardians *ad litem* are directed to submit to the Court and serve upon the parties within thirty (30) days from the date of this Decree a statement of their fees for duties performed through the date of this Decree.

8. The Trustee is authorized to pay to plaintiffs in the McConnell Suit, their actual expenses, including attorneys' fees, as provided in Article VIII, C, 2, up to a limit of Twenty-Five Thousand Dollars ($25,000.00). The Executors and the Trustee are authorized to pay to themselves their expenses, including attorneys' fees, as provided in Article VIII, B of the Agreement.

9. This Decree shall constitute a full and final adjudication of any and all claims, cross-claims, demands and causes of action of any nature, either asserted or which could have been asserted, in the Virginia action, or arising in connection with the Will, or the Trust Indenture, or administration of the Estate and Trust, except for the adopted children issue pending in the Delaware action, as described in Article VI, A of the Agreement; except for any issues of expenses, including attorneys' fees, incurred by any party other than the Executors, the Trustee, and the plaintiffs in the McConnell Suit, as described in Article VIII, C, 1; and except as otherwise provided in paragraph 6 above.

10. The Bequest shall be used by National Trust, consistent with the Agreement and with the purposes set forth in its Charter, only for one or more of the following purposes:

(a) National Trust shall use and apply the Bequest first for payment of each undivided one-fifth interest in all of Montpelier purchased from Jean Ellen duPont Shehan, Evelyn duPont Donaldson, William duPont III, Henry E. I.

duPont and John E. duPont, and any other costs associated with the acquisition by National Trust of the interests of the Decedent's said nephews and nieces in Montpelier.

(b) Costs associated with National Trust's prosecution and settlement of any litigation concerning the Bequest, including its reasonable attorneys' fees.

(c) Research, documentation, stabilization, restoration, renovation, repair, maintenance, operation, furnishing, interpretation and presentation of Montpelier or any portion thereof as an historic site or museum open to the public.

(d) Any improvements at Montpelier which National Trust believes are appropriate and that are consistent with the use of the Mansion as a national historic site or museum open to the public.

(e) Any other purpose National Trust believes appropriate and is consistent with the use of the Mansion as a national historic site or museum open to the public.

(f) Any act necessary or appropriate to carry out the provisions of the Agreement.

11. *Attorney General.* The Attorney General of Virginia shall have the sole responsibility to see that the Bequest to National Trust is used for the purposes stated in Article II, B of the Agreement.

(a) Any determination of whether the Bequest is being so used shall be made in a proceeding brought by the Attorney General of Virginia in this Court. National Trust shall be made a party and notice of the proceeding shall be given to the parties to the Agreement who have provided their addresses to the Attorney General.

(b) If this Court shall determine that the Bequest (or any portion thereof) is not being used in accordance with the purposes stated in Article II, B of the Agreement, the Attorney General shall request this Court to order that the Bequest, or the relevant portion thereof, be devoted by National Trust to the purposes stated in Article II, B of the Agreement; or if

such purposes cannot be accomplished, by some charitable organization (which may include National Trust), for some charitable purpose related to James Madison and his times.

12. The Court retains jurisdiction of this action for the purpose of deciding: (a) any dispute which may hereafter arise in connection with the construction, interpretation or implementation of any provision of the Agreement or of this Decree; (b) any further matters related to the administration of the Decedent's Estate as may come before the Court; or (c) any issues of expenses, including attorneys' fees, described in Article VIII, C, 1 of the Agreement.

13. The Clerk of this Court shall index this Order in the Index of Wills in his Office under the names of Marion duPont Scott and William duPont, Senior. The Clerk shall make a reference to this Order in the margin of the first page of the Will Book where the Will of Marion duPont Scott is recorded and also in the Will Book where the Will of William duPont, Senior, is recorded.

Enter: October 24, 1984

/s/ E. GERALD TREMBLAY
Judge

We ask for this:

/s/ JOHN C. LOWE

/s/ MORRIS L. WEISBERG
Counsel for Plaintiffs
Henry E. I. duPont, Deborah duPont Pries, Henry Laurence duPont, Harriet Nicole duPont, Catherine duPont Schlaeppi,

William Garey Schneider,
Christopher Hans Schneider,
Martha Ann Caroline duPont and
Henri Verge duPont

/s/ HENRY LEE CARTER
Counsel for Cross-Bill-defendants
Beverly Austin duPont and
William Henry duPont, Jr.

/s/ JOHN C. LOWE

/s/ TARAS M. WOCHOK
Counsel for Plaintiff
John E. duPont

/s/ ALEXANDER WELLFORD
Counsel for Intervenor-defendants
Jean Ellen duPont Shehan, Marion
duPont McConnell, Susan
McConnell Rinehart and James
H.T. McConnell, Jr.

/s/ LEONARD S. TOGMAN

/s/ S. PAGE HIGGINBOTHAM
Counsel for Intervenor-defendants
Evelyn duPont Donaldson, Judith
D. Jordan, Elise D. Bulger,
Charlotte A. D. Maher and Linda
D. Donaldson

/s/ LEONARD S. TOGMAN

/s/ S. PAGE HIGGINBOTHAM
Counsel for Intervenor-defendant
William duPont III

/s/ JOHN S. BATTLE
Counsel for Defendant
The National Trust for Historic
Preservation in the United States

/s/ JOSEPH C. KEARFOTT
Counsel for Defendants
V. R. Shackelford, Jr., David C.
Rittenhouse and William duPont
III, Executors of the Estate of
Marion duPont Scott

/s/ ATWELL W. SOMERVILLE
Counsel for Defendant
V. R. Shackelford, Jr.,
Individually

/s/ DANIEL F. LINDLEY

/s/ M. SCOTT HART
Counsel for Intervenor-defendant
Delaware Trust Company, Trustee

/s/ JOHN E. DONALDSON
Counsel for Defendant

Gerald L. Baliles, Attorney General
of the Commonwealth of Virginia

Seen:

/s/ THOMAS M. PURCELL
Guardian *ad litem* for the minor natural issue of Henry E.I. duPont

/s/ J. THOMAS PROVINCE
Guardian *ad litem* for the unborn natural issue of William duPont, Junior

/s/ CAROLINE WATTS
Guardian *ad litem* for the minor and unborn adopted children of the natural issue of William duPont, Junior and for the minor and unborn issue, adopted and natural, of such adopted children

/s/ MARTIN J. MCGETRICK
Guardian *ad litem* for the minor natural issue of Jean Ellen duPont Shehan, Evelyn duPont Donaldson and William duPont III

A COPY TESTE:
/s/ ULYSSES P. JOYNER, JR., Clerk
Circuit Court of Orange County, Virginia

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

HENRY E. I. duPONT, et al.,	)	
Plaintiffs	)	
	)	Civil Action
vs.	)	No. 7421
	)	
DELAWARE TRUST COMPANY, Trustee Under Trust Indenture dated June 7, 1960,	)	
Defendant.	)	

DECREE

AND NOW, this 25th day of October, 1984, upon consideration of the Agreement of Settlement and For Entry of Decrees (the "Agreement"), annexed hereto, dated as of October 15, 1984 between the named plaintiffs and the defendant herein, who are also parties to a companion action, captioned *Henry E. I. duPont, et al. v. V. R. Shackelford, Jr., et al.*, Chancery No. E 84-1 (the "Virginia Action") pending in the Circuit Court of Orange County, Virginia (the "Virginia Court");

IT APPEARING that the Virginia Court appointed separate Guardians *ad litem* to represent (a) the minor, natural issue of William duPont, Junior, whose ancestor had conveyed his or her interest in Montpelier to the National Trust for Historic Preservation in the United States ("National Trust") prior to August 31, 1984; (b) the minor, natural issue of William duPont, Junior, whose ancestor had not conveyed his interest in Montpelier to National Trust prior to August 31, 1984; (c) the unborn, natural issue of William duPont, Junior; and (d) the minor and unborn adopted children of the natural issue of William duPont, Junior, and the minor and unborn issue, adopted and natural of such adopted children; and

IT APPEARING that the various Guardians *ad litem* reviewed the annexed Agreement and have made their respective Reports thereon to the Virginia Court; and

IT APPEARING that upon consideration of the Reports of the Guardians *ad litem*, evidence presented in open court and the arguments of counsel, the Virginia Court has made findings that the Agreement is fair and reasonable and is in the best interests of the Decedent's Estate and Trust and the beneficiaries thereof, and should be approved; and

IT APPEARING that a Decree was entered on the 24th day of October, 1984 by the Virginia Court in the Virginia Action, pursuant to the annexed Agreement;

AND IT FURTHER APPEARING, that the parties to this action have agreed that this Decree may be entered by this Court in accordance with the annexed Agreement.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The terms and provisions of the annexed Agreement are hereby approved and are incorporated by reference into this Decree for all purposes as though set out at length. The action of the Delaware Trust Company, Trustee, in executing the Agreement is hereby confirmed, ratified and approved. The Trustee is hereby relieved of any and all responsibility and liability it might otherwise have on account of the execution of the Agreement, or to the extent that it is performed according to its terms the performance of the Agreement and the settlement of this action and the Virginia Action. The expenses, including attorneys' fees, incurred by the Trustee, shall be paid in accordance with Article VIII, B, 2 of the annexed Agreement.

2. Defendant, Delaware Trust Company, Trustee, shall administer the Trust of Marion duPont Scott ("Decedent") in accordance with the provisions of the Trust Indenture and with the provisions of the annexed Agreement, and in the event of any conflict or inconsistency between any provision of the Trust Indenture and any provision of the annexed

Agreement, the relevant provision of the annexed Agreement shall, in all instances, control the rights and duties of the parties. The Trustee is authorized and directed to carry out all steps necessary to implement fully the annexed Agreement.

3. The adopted children issue, as defined in Article VI, A of the annexed Agreement, is excepted from the settlement and compromise effected by the annexed Agreement, and is specifically neither compromised nor settled. The parties to the Agreement who are plaintiffs herein, or some of them, shall have the right, as provided for in Article VI, B of the annexed Agreement, before January 1, 1985 and not thereafter, to institute a new action in this Court asserting only the adopted children issue. Nothing in this Decree shall be construed to prevent any person who is not presently *sui juris* and who claims an interest in the Trust from hereafter raising the question of whether adopted persons and their issue, natural and adopted, can be beneficiaries under the Trust Indenture, but any such claim shall be limited to income or principal not distributed prior to the filing of any such action against, and service upon, the Trustee.

4. The Court shall retain jurisdiction of this action for the purposes of deciding or ruling upon any dispute which may hereafter arise in connection with the interpretation or application of the Trust Indenture or any matter of Trust administration in connection with any provision of the annexed Agreement or of this Decree.

5. Except as provided in paragraphs 3 and 4 hereof, this Decree shall constitute a full and final adjudication of any and all claims, cross-claims, demands, motions and causes of action of any nature, either asserted or which could have been asserted in this action, or arising in connection with the Trust Indenture and Amendments thereto or the administration of the Trust.

/s/ MAURICE A. HARTNETT, III

Maurice A. Hartnett, III
Vice Chancellor

The signing by the Vice Chancellor of, and the entry of, the foregoing Decrees, is hereby approved.

/s/ JOHN C. PHILLIPS

John C. Phillips
200 West Ninth Street
Wilmington, DE 19801

/s/ MORRIS L. WEISBERG

Morris L. Weisberg
Blank, Rome, Comisky & McCauley
1200 Four Penn Center Plaza
Philadelphia, PA 19103

/s/ TARAS M. WOCHOK

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Attorneys for Plaintiffs

POTTER ANDERSON & CORROON

By /s/ DANIEL F. LINDLEY

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Attorneys for Defendant
Delaware Trust Company

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CATHERINE duPONT SCHLAEPPI, WILLIAM GAREY SCHNEIDER, CHRISTOPHER HANS SCHNEIDER, MARTHA ANN CAROLINE duPONT, and HENRI VERGE duPONT, children of Henry E. I. duPont and Martha Verge duPont, and ELIZABETH ANSLEY SCHLAEPPI, a child of Catherine duPont Schlaeppi,	)	Civil Action No. 7898
Plaintiffs,	)	
v.	)	
DELAWARE TRUST COMPANY, Trustee under a Trust Indenture with Marion duPont Scott, deceased, dated June 7, 1960, and amended on June 17, 1970,	)	
Defendant.	)	

Court of Chancery of Delaware,
New Castle County

Submitted: April 11, 1986
Decided: September 17, 1986

ON DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT: GRANTED.

John C. Phillips, Jr., PHILLIPS & SNYDER, P.A., Wilmington, and Morris L. Weisberg, BLANK, ROME, COMISKY & McCAULEY, Philadelphia, Pa., for plaintiffs

Blaine T. Phillips, and Daniel F. Lindley, POTTER, ANDERSON & CORROON, Wilmington, Del., for defendant-trustee

HARTNETT, Vice Chancellor

This is the latest, and hopefully final, legal proceeding arising out of an *inter vivos* Trust created by Mrs. Marion duPont Scott in 1960—long before she died in 1983. Plaintiffs are descendants by adoption of William duPont, Jr., the brother of Mrs. Scott. As such they are a grandnephew, grandniece or great grandniece by adoption of the deceased. They are not, however, blood relatives of Mrs. Scott. They brought this action seeking to be included as beneficiaries under the Trust. The defendant, Delaware Trust Company, the trustee, moved to dismiss the amended complaint. I find that the motion must be granted.

I

The essential facts are not disputed. The late Mrs. Scott executed the Trust in 1960 and amended it in 1970. A second amendment was executed in 1976 but it is not relevant to the present controversy. Section II(4)(a) of the Amended Trust Indenture (hereinafter referred to as "Proviso (a)") provides, in part:

> "For the purposes of this Trust reference to 'grandnieces and grandnephews and great grandnieces and great grandnephews' and 'issue of great grandnieces and issue of great grandnephews' *shall mean lawful blood descendants* of the Grantor's brother, William duPont, Jr., provided always, however, that:
>
> (a) *An adopted child* and such adopted child's lawful blood descendants *shall not be considered as lawful blood descendants* of the adopting parent or parents or of anyone who is an ancestor of the adopting parent." (Emphasis added.)

This language on its face clearly and unambiguously

shows that Mrs. Scott intended to preclude plaintiffs from benefitting under the Trust. Plaintiffs, however, assert numerous claims that the language does not preclude them from benefitting from it.

Mrs. Scott died on September 4, 1983 and soon thereafter actions concerning the Trust and her Will were filed in this Court: *DuPont, et al. v. Delaware Trust Co.*, Del. Ch., Civil Action No. 7421-NC; and in the Circuit Court of Orange County, Virginia: *DuPont, et al. v. Shackelford, et al.*, Chancery E 84-1. These cases, and a related action, *McConnell v. Delaware Trust Co.*, Del. Ch., Civil Action No. 7673-NC, were ultimately resolved pursuant to a Settlement Agreement executed by all the parties to the suits on October 15, 1984 and approved by this Court and the Virginia Court later that same month. All the present plaintiffs joined in the Settlement Agreement.

The Settlement Agreement, however, did not dispose of all the disputes over the Scott Trust. Paragraph VI(B) of the Settlement Agreement permitted the present plaintiffs to file "a new and separate suit in the Delaware Court raising the adopted children issue." This "adopted children issue" is defined in Paragraph VI(A) of the Settlement Agreement as "the claim embodied in Count IV" of the Complaint filed in *DuPont, et al. v. Delaware Trust Co.*, Del. Ch., Civil Action No. 7421-NC, the original Delaware action.

On December 28, 1984, plaintiffs filed this present lawsuit. In their Complaint, they alleged that the late Mrs. Scott intended to include plaintiffs as beneficiaries under her Trust (Count I); that Mrs. Scott intended 13 *Del. C.* §919(a) to govern the Trust, and thereby intended that plaintiffs be deemed to be lawful blood descendants of William duPont, Jr. (Count II); and that the Fourteenth Amendment to the United States Constitution bars this Court from ruling that plaintiffs are not beneficiaries under the Trust solely because of their adopted status (Count III).

The Trustee responded by urging that plaintiffs bargained away their Count I and Count III claims in the

prior Settlement Agreement and that the remaining allegations (Count II of the Complaint) fail to state claims upon which relief can be granted.

II

I will first consider the arguments as to Count II of the Complaint. The Trustee concedes that Count II is not barred by the Settlement Agreement, however it argues that it fails to allege a claim upon which relief can be granted. The allegations of Count II, read in the light most favorable to plaintiffs, challenge the validity of Proviso (a) of the Trust.

Plaintiffs claim that Proviso (a) is invalid because it is contrary to the provisions of 13 *Del. C.* §919(a). That subsection is part of subchapter I, chapter 9, title 13 *Delaware Code* which is the statute that provides for and regulates the adoption of children in Delaware. It states:

> "(a) Upon the issuance of the decree of adoption, the adopted child shall be considered the child of the adopting parent or parents, entitled to the same rights and privileges and subject to the same duties and obligations as if he had been born in wedlock to the adopting parent or parents."

In Count II of the Complaint plaintiffs also allude to an argument—made more explicitly in Count IV of the First Amended Complaint in the original Delaware action—that 13 *Del. C.* §919(a) supersedes Proviso (a). Plaintiffs claim that 13 *Del. C.* §919(a) is incorporated by reference into the Trust by Section IV(2) of the Trust which states that Delaware law is to control all questions of the Trust's construction or validity. Plaintiffs argue that the provisions of 13 *Del. C.* §919(a) are inconsistent with Proviso (a), and therefore plaintiffs conclude that Section IV(2) of the Trust (and by implication 13 *Del. C.* §919[a]) should prevail over Proviso (a), thereby allowing them to take as beneficiaries under the Trust despite the clear language of Proviso (a).

Plaintiffs' argument, however, incorrectly states both the

scope and the substance of the law of this State. While plaintiffs focus on the language of 13 *Del. C.* §919(a), they ignore the holdings in Delaware cases which also constitute Delaware Law. These Delaware cases clearly hold that 13 *Del. C.* §919(a) provides only a rebuttable presumption—not a mandate—that adopted children be treated the same as biological children in the construction of the provisions of trust instruments. *Wilmington Trust Co. v. Huber,* Del. Ch., 311 A.2d 892 (1973), *aff'd sub. nom., Benz v. Wilmington Trust Co.,* Del. Supr., 333 A.2d 169 (1975). This presumption can be overcome by a showing that the trust instrument itself evinces a clear intent to exclude adopted persons. See *Benz v. Wilmington Trust,* supra, 333 A.2d at 170. See also, *Jackson v. Riggs Nat'l. Bank of Washington, D.C.,* Del. Supr., 314 A.2d 178 (1973); *Haskell v. Wilmington Trust Co.,* Del. Supr., 304 A.2d 53 (1973); *Wilmington Trust Co. v. Chichester,* Del. Ch., 369 A.2d 701 (1976), *aff'd.,* Del. Supr., 377 A.2d 11 at 14 (1977) ("adult adopted persons are permitted to take through their adoptive parents *where the pertinent instruments evince no intent to the contrary*"). (Emphasis added.)

Delaware law therefore does not prohibit settlors from excluding adopted persons from their trusts as plaintiffs assert; rather, Delaware law simply presumes that settlors do not intend such exclusions absent clear directions to the contrary. Mrs. Scott's intention to exclude adopted children and the adopted children's blood descendants is, however, clear and unambiguous from the language of Proviso (a).

Plaintiffs also assert that Proviso (a) of the Trust is, for some unspecified reason, void. Proviso (a), however, is consistent with Delaware case law which permits a settlor to exclude adopted persons from a trust and, while, as indicated above, such exclusions are not favored in this State, they are permitted. I conclude, therefore, that Count II of the First Amended Complaint fails to state a claim upon which relief can be granted and must be dismissed.

III

Next to be considered is the Trustee's attack on Count I of

the Complaint. Giving plaintiffs the benefit of any reasonable inferences, I find that three distinct claims are set forth in Count I: (1) that plaintiffs are, under Delaware law, the lawful blood descendants of William duPont, Jr.; (2) that, as a matter of law, the late Mrs. Scott intended to include plaintiffs as beneficiaries under the Trust; and (3) that Mrs. Scott lacked the capacity to amend the Trust for many years prior to her death in 1983.

A.

The first allegation of Count I of the Complaint—that under Delaware law plaintiffs must be treated as the lawful blood descendants of their adopting parents—is merely the same argument made, as discussed above, in connection with Count II of the Complaint. Suffice to say that, because the first allegation of Count I merely mirrors Count II, it must be similarly dismissed for failure to state a claim upon which relief can be granted.

B.

The Trustee next asserts that the doctrine of *res judicata* bars the second and third allegations of Count I of the Complaint. In support of its position it refers to Section I (B) of the Settlement Agreement adopted by the decrees of this Court and the Virginia Court, which stated that it resolved:

> "... fully and finally any and all claims, cross-claims, demands and causes of action of any nature, either asserted or which could have been asserted in the [prior litigation], or arising in connection with or related to Decedent's Will, the administration of the Estate, the Indenture, the administration of the Trust, [or] the execution of this Agreement ... except for the adopted children issue in the Delaware Action, as provided in Article VI hereof, and any issues of expenses ..."

A settlement which is approved by a court has the same *res judicata* effect as a final judgment on the merits. *Ezzes v. Ackerman*, Del. Supr., 234 A.2d 444 (1967); *Maldonado v.*

Flynn, Del. Ch., 417 A.2d 378 (1980). The doctrine of *res judicata* is available as a defense:

> "... if the pleadings framing the issues in the first action would have permitted the raising of the issue sought to be raised in the second action, and if the facts were known, or could have been known to the plaintiff in the second action at the time of the first action ..." (Citation omitted.)

Ezzes v. Ackerman, supra, 234 A.2d at 445-446.

The defense of *res judicata,* therefore, clearly applies to the second and third allegations of Count I of the Complaint.

In the second allegation of Count I plaintiffs refer to Section II(4)(b) of the Trust and quote language from Mrs. Scott's Will and then claim that the instruments show that Mrs. Scott intended to include plaintiffs as beneficiaries under the Trust. Leaving aside the merits of such an allegation (novel as it may seem), it is clear that this claim could have been raised in the original Delaware action. Moreover, because the claims in this present suit are based entirely on the language of the Trust and Mrs. Scott's Will, both of which were attached as exhibits to the First Amended Complaint in the original Delaware action, plaintiffs cannot claim that they now raise new facts which could not have been known at the time of the first action.

C.

Likewise, the allegations contained in Count I of the Complaint, that Mrs. Scott was incompetent to amend her Trust is now barred by the *res judicata* effect of the Settlement Agreement. This claim not only could have been raised in the original Delaware action, it was. Count II of the First Amended Complaint in Del. Ch., Civil Action No. 7421-NC alleged that Mrs. Scott lacked the capacity to reform her Trust in 1976 or years before her death in 1983. Thus, assuming *arguendo* that this allegation states a cognizable claim, although it does not assert that the settlor was incompetent in

1970 when the dispositive amendment to the Indenture was executed, it is also barred by the doctrine of *res judicata* because it was a claim raised in the prior suit and compromised by the settlement.

D.

Plaintiffs, however, contend that the second and third allegations of Count I cannot be barred by the doctrine of *res judicata* because these allegations were specifically exempted from the settlement decrees in the prior actions. The language of the Settlement Agreement expressly preserves "the adopted children issue" for further litigation in "a new and separate action". This exemption, however, cannot be given the expansive definition urged by plaintiffs because the Settlement Agreement expressly limits the adopted children issue to "the claim embodied in Count IV" of the Complaint in Del. Ch., Civil Action No. 7421-NC. The substance of that claim stated:

> "Section IV(2) of the Trust Indenture of Marion duPont Scott provides that all questions pertaining to the construction or validity of the Trust Indenture shall be governed by the law of the State of Delaware. The law of Delaware as to adopted children, embodied in 13 *Del. C.* §919 and 920 ... was thus made controlling by Marion duPont Scott ... and the laws and public policy of the State of Delaware prevail over any contrary provision in the Trust Indenture of Marion duPont Scott."

The only viable defense to the *res judicata* claim posed at this juncture, therefore, is whether the second and third allegations of Count I in this present case can fit within the claims embodied in the above language.

Plaintiffs maintain that Count IV of the original Delaware action fairly raised the issue of whether Mrs. Scott really intended to exclude them from her Trust. They also urge that the second and third allegations of Count I of the present suit raise questions concerning the settlor's intent and thus are

similar enough to Count IV of the original suit to survive the settlement of the earlier lawsuits. I disagree.

Although the second and third allegations of Count I of the First Amended Complaint in the present case can be facially harmonized with the allegations in Count IV of the Complaint in the original Delaware action, three separate claims are actually alleged, each of which is predicated on radically different theories. The second allegation of Count I of the Complaint presently before the Court is premised on the alleged inconsistency of Section II(4)(b) of the Trust, certain language of the settlor's Will, and Proviso (a), whereas the third allegation of this Count focuses on the mental state of Mrs. Scott. Conversely Count IV of the Complaint in the original Delaware action alleged that Proviso (a) could not be reconciled with Section IV(2) of the Indenture and 13 *Del. C.* §§919 and 920. I, therefore, conclude that the second and third allegations of Count I of the Complaint presently before the Court do not spring from the claim which was preserved by the Settlement Agreement and therefore Count I must be dismissed because it was compromised in the prior litigation.

IV

Assuming, arguendo, that the doctrine of *res judicata* does not bar any of the plaintiffs' claims which are based on the Fourteenth Amendment to the U.S. Constitution, it is clear, nonetheless, that Count III of the Complaint does not make a sufficient allegation of state action to fall within the protection of the Fourteenth Amendment and therefore must be dismissed for failure to state a cause of action upon which relief can be granted. The Fourteenth Amendment protects individuals only against the acts of States. U.S. Const. Amend. XIV §1; *e.g., Rendall-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). In *In re Will of Potter*, Del. Ch., 275 A.2d 574, 580 (1970), this Court recognized that "the Fourteenth Amendment does not apply to purely private trusts."

In determining whether there is sufficient state action to

bring a matter within the ambit of the provisions of the Fourteenth Amendment, courts must look to the facts and circumstances of each case. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). In the present case the Complaint, even when cast in the light most favorable to plaintiffs, does not even suggest that the State of Delaware or any of its agents ever controlled, advised, or were in any way involved with either the Scott Trust or Will or the defendant-trustee before these suits were brought.

Plaintiffs argue, however, that if this Court finds that the defendant-trustee must exclude them from the Scott Trust solely because of their adopted status, such a finding alone would constitute sufficient state action to invoke the provisions of the Fourteenth Amendment. Plaintiffs therefore, in effect, contend that this Court has no choice but to invalidate Proviso (a). In support of this position plaintiffs cite, *inter alia*, *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *State v. Brown*, Del. Supr., 195 A.2d 379 (1963); and *Bank of Delaware v. Buckson*, Del. Ch., 255 A.2d 710 (1969).

In each of these cases, however, there was a much greater showing of state action than can be inferred from plaintiffs' allegations in their Complaint. All of the cases cited by plaintiffs involved racial discrimination which is especially suspect. In order to find State action, courts generally require a more compelling showing of state involvement where discrimination on some grounds other than race is alleged. Annot., 42 A.L.R.2d 463, at 471 (1979 & Supp. 1985).

Even in cases where racial discrimination was claimed, and this Court found that it could neither enforce nor instruct a trustee to honor a racially discriminatory clause in a trust instrument, the Court was not content to hold that such an instruction alone was state action within the meaning of the Fourteenth Amendment. In *Milford Trust Co. v. Stabler*, Del. Ch., 301 A.2d 534 at 537 (1973); *Will of Potter*, supra, 275 A.2d at 582-583. And in *Bank of Delaware v. Buckson*, supra,

255 A.2d at 714-715, this Court relied on facts independent of its own role in order to find State action. No such facts have even been alleged here.

The present case also comes to this Court on a much different footing than in the federal cases cited by plaintiffs. In *Barrows v. Jackson,* supra, 73 S.Ct. 1031 and *Shelley v. Kraemer,* supra, 68 S.Ct. 836, the parties to a racial restrictive land covenant brought actions at law and in equity to enforce the agreements when some of their co-covenantors sold parcels to blacks. Similarly, in *State v. Brown,* supra, 195 A.2d 379, a merchant initiated the prosecution of an action for criminal trespass against a black who refused to leave his store after being denied service. Thus, in the federal cases cited by plaintiffs a court was called upon to enforce a policy of racial discrimination. In the words of the United States Supreme Court, "These are not cases ... in which the States have merely abstained from action, leaving private individuals free to impose such discrimination as they see fit." *Shelley v. Kraemer,* supra, 68 S.Ct. at 845.

The allegations of plaintiffs, however, are quite different. It is the plaintiffs who are seeking to have this Court rewrite the Indenture to include them as beneficiaries. This the Court cannot do as the Trust is purely a private matter. See *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) which held that a State is not responsible for the initiatives of a private party even where the State approves or acquiesces in those initiatives, and 15 AM.JUR.2d, *Civil Rights* §10.

Because I have concluded that plaintiffs have provided no discernable basis for a finding of state action, Count III of the Complaint must be dismissed for failure to state a claim upon which relief can be granted.

V

Even if I were somehow able to glean some state action from the allegations of Count III, I would still have to dismiss this Count on the alternative ground that it fails to state a

proper claim for relief under the Equal Protection Clause of the Fourteenth Amendment. When legislation is challenged as being contrary to the Equal Protection Clause, courts apply greater scrutiny to those statutes which either impair a right protected by the Constitution or affect a suspect class. *Cleburne v. Cleburne Living Center,* 473 U.S. 432, at 439, 105 S.Ct. 3249, at 3254, 87 L.Ed.2d 313, at 320 (1985). Although the challenge here is not to a legislative act but to a judicial rule, I will, *arguendo,* ignore the difference.

There is clearly no constitutional right at stake. Plaintiffs do not, and cannot, claim that they have any choate interest in the *res* of the Scott Trust or a right to be named as beneficiaries. Instead, plaintiffs assert that their exclusion from the Trust must be strictly scrutinized because they, as adopted persons, are members of a suspect class.

Plaintiffs failed to cite, however, any case holding that adopted persons constitute a suspect class under the Equal Protection Clause. The United States Supreme Court has held that statutory classifications based on race, alienage and national origin warrant its strictest scrutiny. *Cleburne Living Center,* supra, 105 S.Ct. at 3255. It has, however, declined to afford the same high level of scrutiny to illegitimate children. *Mathews v. Lucas,* 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976). The Court in *Mathews v. Lucas* reasoned that, although arbitrary discrimination against the illegitimate was impermissible, not all distinctions based on legitimacy were inherently untenable. *Mathews,* 96 S.Ct. at 2762. In addition, the Supreme Court found that "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes" (citation omitted). *Id.*

Everything the Supreme Court said of illegitimates, by analogy, also is applicable to adopted persons. Accordingly, I find that the challenged rule of law here should be given the same scrutiny as is normally attributed to statutes which make distinctions on the basis of legitimacy. Under this level of review, the party challenging the classification bears the

burden of establishing its insubstantiality. *Mathews v. Lucas*, supra, 96 S.Ct. at 2764.

Given the above standard of review and finding the manifest reasonableness of the challenged Delaware rule of law, it is clear that plaintiffs could not prevail under any set of facts which they have alleged. In adopting the rule of law that a testator may disinherit adopted children, if he desires, the courts of Delaware have merely held that the State has an interest in protecting the rights of property owners to dispose of their holdings as they see fit. This rule does not necessarily discriminate against adopted persons because it does not prohibit them from being included in a trust. It merely treats them as any other relatives—who may be favored or disinherited at the discretion of the Settlor.

Another reason that the rule of law in this State is not unfair is that it prevents a testator's intent from being subverted by technicalities. Mrs. Scott's Trust Indenture evinces an intent to use the trust assets to benefit the blood descendants of William duPont, Jr., the settlor's brother. Without Proviso (a) in place, however, an actual descendant of William duPont, Jr. could adopt an unlimited number of persons—all of whom might then become beneficiaries of the Scott Trust. Thus the assets of the Trust would be spread far beyond the limits intended by the late Mrs. Scott.

In addition, the late Mrs. Scott may have executed Proviso (a) with the intention of specifically excluding the plaintiffs. Despite plaintiffs' arguments to the contrary, there is no reason why a settlor should have to identify by name the adopted persons she wanted to exclude from her Trust—indeed, a sense of diplomacy may have led Mrs. Scott to couch Proviso (a) in its present terms or she may have suspected that other children might be adopted after the Trust was executed. In any event, it was for Mrs. Scott to decide who would be the beneficiaries of her Trust. *Will of Potter*, supra, 275 A.2d at 582. And the State is justified in preserving her right to select the objects of her bounty.

Count III of plaintiffs' Complaint fails to allege any

grounds under which I could find that the challenged rule is insubstantially related to a valid State interest. Plaintiffs cannot, on their allegations, carry their burden under *Mathews v. Lucas*, supra. Count III therefore must be dismissed along with the rest of the Complaint.

VI

I also note that plaintiffs' briefs have set forth a hodgepodge of facts and other arguments. Plaintiffs seem to claim that the fact that they were not strangers to Mrs. Scott's family before their adoption is somehow important. Because plaintiffs have not claimed that, but for their adoption, they would be beneficiaries under the Scott Trust, I disagree. Plaintiffs also argue that the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution requires this Court to conform to the Legislative mandate of 13 *Del. C.* §919(a) and thus requires that Proviso (a) be invalidated. I have decided, however, that Proviso (a) is consistent with Delaware Law—including §919(a)—and it is pointless to discuss this argument any further.

Finally, plaintiffs contested defendant's *res judicata* defense with a curious mix of assertions apparently to the effect that: under the Chancery Rules they should be allowed to freely amend the claims which were not prejudiced by the Settlement Agreement; that the Trustee has somehow distorted the distinctions between claims and allegations; and that the Trustee's position depends on the obsolete "Theory of the Pleadings". Suffice it to say that my holdings that the claims raised by plaintiffs are barred by *res judicata* are not based on procedural rules of semantics or arcane theories of jurisprudence. Rather, I have barred the claims pursuant to the clear language of the Settlement Agreement which was primarily drafted by plaintiffs' counsel and which both sides agreed to only after protracted arm's-length negotiations. Whatever plaintiffs may now think about the effect of the Settlement Agreement, it is clear that they have gotten what

they bargained for. Accordingly, the Complaint must be dismissed in its entirety.

IT IS SO ORDERED.

EXCERPT FROM TRANSCRIPT OF ORAL ARGUMENT IN THE SUPREME COURT OF THE STATE OF DELAWARE (MARCH 10, 1987; MOORE, WALSH AND HOLLAND, JJ.)

[pp. 25–26]

* * *

JUSTICE WALSH: If you had specified name by name what would be the status of the after born adopted children?

MR. WEISBERG: That's easy. "All of the children of Mr. and Mrs. Henry E. I. duPont now adopted or hereafter adopted by them shall not be beneficiaries of my trust."

JUSTICE WALSH: How about if John adopted ten children? Would they be covered?

MR. WEISBERG: Well, John is not married.

JUSTICE WALSH: He can still adopt children.

MR. WEISBERG: They will not be covered in my understanding of what the intention was here.

JUSTICE WALSH: They will not be excluded had they used your specific language, is that correct?

MR. WEISBERG: I think if they are stranger adoptees they would be excluded.

* * *

Supreme Court, U.S.
FILED
AUG 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1962

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

CATHERINE duPONT SCHLAEPPI, *et al.*,
Petitioners,

v.

DELAWARE TRUST COMPANY, *Trustee, etc.*,
Respondent.

REPLY BRIEF ON CERTIORARI

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NO. 86-1962

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

CATHERINE duPONT SCHLAEPPI, *et al.*,
Petitioners,

v.

DELAWARE TRUST COMPANY, *Trustee, etc.*,
Respondent.

REPLY BRIEF ON CERTIORARI

A. THE DELAWARE SUPREME COURT DID NOT REST ITS DECISION OF THE CONSTITUTIONAL ISSUES UPON ANY NON-FEDERAL GROUND

Delaware Trust claims that the decision of the Delaware Supreme Court on the constitutional issues was based upon two non-federal grounds: (a) a decision on the defense of res judicata which was raised in Delaware Trust's motion to dismiss the complaint; and (b) a decision on the constitutionality of the challenged Delaware rule as to the standard of proof involved in disinheriting adopted children. (Br. at 6-7). It is obvious that the non-federal ground rule has no application: (a) neither the Vice Chancellor nor the Delaware Supreme Court *decided* the res judicata issue in connection with the constitutional issues; (b) the question of whether Delaware's standard of proof offends the Fourteenth Amendment is purely a question of federal law.

The Vice Chancellor refused to decide the res judicata issue in connection with the constitutional issues although Delaware Trust urged the Vice Chancellor to do so. Delaware Trust advised[1] the Delaware Supreme Court that "the Vice Chancellor did *not* decide whether Count III is also barred by the Delaware and Virginia Decrees", and argued that since that question was "fairly presented" to the Vice Chancellor the Delaware Supreme Court could decide the question on the appeal to it. Delaware Trust's contention here that the Vice Chancellor decided the res judicata issue is a total flip-flop from the opposite position taken by it before the Delaware Supreme Court. The Delaware Supreme Court itself *also* refused to decide the res judicata defense as to the constitutional issues by adopting the Vice Chancellor's opinion.

Even if the Vice Chancellor had decided the res judicata defense as to the constitutional issues, his discussion of that defense (as he applied it to two of the legal grounds asserted in Count I of the complaint) (Pet. at 8a), is so meritless that this Court would have had to declare such alleged non-federal ground totally inadequate within the purview of the non-federal ground rule. Delaware Trust does not address plaintiffs' argument (Pet. at 28-29). Delaware Trust does not controvert the fact that in the Settlement Agreement the adopted children *claim* was preserved—not extinguished—and that all parties thereto authorized plaintiffs to assert the adopted children claim in a new, separate action, without prejudice,[2] and without any restrictions as to the *legal grounds* which might be asserted in the new action.

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1. Answering Brief of Appellee Delaware Trust Company at p. 8, filed January 22, 1987.

2. Delaware Trust misleadingly omits (Br. at 3) paragraph C from its quotation of Article VI, which provides that the settlement is "without prejudice" to plaintiffs' right to continue litigation of the adopted children claim.

Further, Delaware Trust's argument is internally repugnant. In one breath, Delaware Trust argues that this Court lacks jurisdiction to determine the adequacy of the res judicata defense (Br. at 7), and in the next breath Delaware Trust argues that this Court should do what the Delaware Supreme Court refused to do, namely, decide the merits of the res judicata defense. (Br. at 9, n. 3).

As to Delaware Trust's contention that a Delaware settlor has a putative "right" to disinherit adopted children, that contention is merely a restatement in other words of the one issue involving the constitutionality of the challenged State rule. This contention conflicts with the most fundamental principles of federal jurisprudence. While the highest State court is the final arbiter of the meaning of a State rule, the question whether such a State rule offends the due process and equal protection clauses is purely a question of federal law. The Fourteenth Amendment mandates minimum requirements of due process which must be observed by a State in applying its standard of proof for determining alleged disinheritance[3] of adopted children. These federal constitutional minimum requirements are not diminished by a State court's opinion that the State rule is adequate, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982), *Vitek* v. *Jones*, 445 U.S. 480, 490-491 (1980), and the adequacy of the challenged Delaware rule herein "must be analyzed in constitutional terms". *Logan* v. *Zimmerman Brush Co., supra*, 455 U.S. at 432-433.

B. ENFORCEMENT BY THE DELAWARE SUPREME COURT OF THE INVIDIOUS DISCRIMINATION EMBODIED IN PROVISO (a) CONSTITUTES STATE ACTION

We have demonstrated (Pet. at 15-16) that acts of the

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3. "Disinheritance" is the accurate term since the Delaware adoption statute makes plaintiffs the statutory heirs of the settlor herein. 13 *Del. C.* §920(b). (Pet. at 72a).

Delaware Supreme Court in construing the indenture and the adoption statute and in enforcing the invidious discrimination which it found in Proviso (a) constitute State action. Delaware Trust does *not* controvert this demonstration, but argues that the Delaware Supreme Court did not really enforce the discrimination and merely "abstained" from action. It is self-evident, however, that the State did not abstain from action, but on the contrary, through its courts, decided the issues and instructed the trustee that plaintiffs should be disinherited, instructions which were supported by "the full panoply of state power." *Shelley* v. *Kraemer*, 334 U.S. 1, 19 (1948).

Nor can Delaware Trust make a virtue out of dereliction of fiduciary duty in seeking judicial instructions. That plaintiffs were compelled to act because of the trustee's refusal does not make the determination of the Delaware Supreme Court any less State action. For state action to exist, "the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination": *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172 (1972).

C. ADOPTED CHILDREN SHOULD BE DECLARED A QUASI-SUSPECT CLASS

Plaintiffs demonstrated (Pet. at 13-15) that adopted children should be treated as a quasi-suspect class for Fourteenth Amendment analysis; they possess all of the characteristics of a quasi-suspect class, including a history of purposeful discrimination and discrimination based upon characteristics derived from birth.

Delaware Trust seeks to obfuscate the true issue by referring to cases involving *suspect* classes, not *quasi*-suspect classes, and Delaware Trust ignores the fact that the Delaware Supreme Court itself held that "[e]verything the Supreme Court said of illegitimates, by analogy, also is applicable to adopted persons". (Pet. at 14a). Finally, Dela-

ware Trust's authority for the proposition that adopted children have not been historically the victims of discrimination is the unsupported dictum of one lower federal court,[4] a dictum contrary to every book and article on the subject.[5]

Unfortunately, there can be no dispute that the history of adoption in this country is a history of treatment of adopted children as "second-class" citizens. Adoptees' Equal Protection Rights, 28 UCLA L. Rev. 1311, 1334-5 (1981). In this case Delaware's highest court has declared that the plaintiffs—six out of the 37 grandnephews and grandnieces and great grandnephews and great grandnieces of settlor—must be treated during their lives as "second-class" family citizens.

Vital interests of the plaintiffs and their parents are implicated here. It is a record fact that the plaintiffs were nurtured as infants and minors in a household in which there were no "second-class" family citizens. Any parent can understand how disastrously the subtle emotional and psychological underpinnings of the family have been disrupted by enforcement of this invidious discrimination. The "intangible fibers" which connect parent and child and

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4. *Williams* v. *Mathews*, 441 F. Supp. 1045, 1049 (E.D.La. 1977). All of the cases decided under the Social Security Act are inapposite since they deal with claims that adopteds fall into a suspect category.

5. B. Lifton, Lost & Found (1979); B. Tizard, Adoption: A Second Chance (1977); M. Kornitzer, Adoption and Family Life (1968); M. Langsam, Children West (1964); H. Kirk, Shared Fate (1964). *See also* the following articles: C.M.A. McCauliff, The First English Adoption Statute and Its American Precursors, 16 Seton Hall L. Rev. 656 (1986); R.W. Howe, Adoption Practice, Issues and Laws 1958-1983, XVII Family L. Quart. 173 (No. 3, Summer 1983); Y. Kawashima, Adoption in Early America, 20 J. Family L. 677 (1981-82); S.B. Presser, The Historical Background of the American Law of Adoption, 11 J. Family L. 443 (1971); Huard, The Law of Adoption: Ancient and Modern, 9 Vand. L. Rev. 743 (1956).

which provide our society with "strength, beauty and flexibility" have been torn asunder. "It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases": *Lehr* v. *Robertson*, 463 U.S. 248, 256 (1983).

Family interests are also involved herein. The family is the one institution through which our society inculcates and passes down its most cherished values. Therefore, freedom of personal choice in matters of family life, such as a stepfather's choice not to discriminate among his children on the basis of whether a child entered his family by birth or adoption, is a "fundamental liberty interest protected by the Fourteenth Amendment". *Bowen* v. *Gilliard*, ___ U.S. ___, Slip. Op. p. 3 June 25, 1987 (Brennan, J. dissenting); *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982). This Court may not be able to assure an adopted child that there will be no discrimination against him or her during his or her lifetimes on the sole ground of their being adopted, but this Court should be able to assure an adopted child that the Fourteenth Amendment will not allow any State—arbitrarily or capriciously or without any hearing—through rules applied in the State's courts to contribute to their pain. *Cf. Bowen* v. *Gilliard, supra*, ___ U.S. ___ Slip. Op. at 26 (Brennan, J. dissenting).

D. THE CHALLENGED DELAWARE RULE OFFENDS THE STANDARDS OF THE FOURTEENTH AMENDMENT

Although, as earlier shown (Pet. at 20), the Vice Chancellor applied a rule which is a sharp departure from the Delaware rule established by earlier decisions, we must accept formulation of the State rule as described by the Vice Chancellor and its affirmance by the Delaware Supreme Court, even though the complaint was dismissed without any consideration of the surrounding circumstances. The Delaware Supreme Court also held that plain-

tiffs had the *burden* of establishing the "insubstantiality of the State's rule". (Pet. at 14a).

This Court has pointed out that the function of a standard of proof is to instruct the fact-finder concerning the degree of confidence which society thinks he should have in the correctness of factual conclusions for a particular type of adjudication; that in any given proceeding the minimum standard of proof tolerated by due process requirements reflects society's judgment about how the risk of error should be distributed between the litigants. *Santosky* v. *Kramer, supra,* 455 U.S. at 754-755. In the ordinary suit for money damages it is appropriate to make the litigants share the risk of error. But a higher standard of proof is mandated when personal rights and interests are involved; where, as here, rights of innocent adopted stepchildren are involved, the Fourteenth Amendment requires that the risk of error be imposed on the proponents of disinheritance, *i.e.* an adopted stepchild not be disinherited except after a plenary trial, or—without a trial—only when the language of the dispositive instrument, read in light of the surrounding circumstances, is *certain* and *unmistakable* in its identification of the children purportedly disinherited. We have earlier shown that Proviso (a) does *not* contain any certain and unmistakable reference to the plaintiffs. (Pet. at 22-23).[6] *Santosky* v. *Kramer, supra,* 455 U.S. at 756.

Delaware Trust argues that this case presents "no issues of importance to anyone but the parties themselves." (Br. at 16). However, the number of adoptions in this

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6. In its brief, Delaware Trust misleadingly states that Proviso (a) refers to *"all"* adopted children when it actually refers only to *"an"* adopted child. Further, Delaware Trust in 30 instances in its brief refers to "an adopted *person*", when Proviso (a) actually refers to "an adopted *child*", and 13 *Del. C.* §§919 and 920 also refer repeatedly to "an adopted *child*".

country is ever increasing, and each new adoption creates relationships which are estimated to affect one-third of the population or 80 million people. (Pet. at 15, n. 20). Thus, the issue of interpretation of dispositive instruments involving adopted children has "become the subject of a seemingly endless stream of litigation",[7] and the same issues of standard of proof herein would have arisen under the laws of the other States if they were involved: most States provide by statute that an adopted child becomes the child of the adoptive parent as if such child had been *born* to the adoptive parent. For example, State statutes make the adopted child the "natural", or "genetic", or "biological" child of the adoptive parent; or the "legitimate blood descendant", or "child of natural bodily issue", or "natural child of the whole blood", or "as if born of their bodies".[8] Most States—either by statute or judicial rule—

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7. J. E. Rein, Relatives By Blood, Adoption and Association: Who Should Get What and Why, 37 Vand. L. Rev. 711, 731-732 (1984).

8. Ala. Code §26-10-5 (1975, Repl. Vol. 1986); Alaska Stat. §25.23.130 (1986); Ariz. Rev. Stat. Ann. §8-117 (1974); Ark. Stat. Ann. §56-215 (1971, Cum. Pkt. Supp. 1985); Colo. Rev. Stat. §19-4-113 (1986); Conn. Gen. Stat. §45-64(a) (1981, Cum. Ann. Pkt. Pt. 1987); D. C. Code Ann. §16-312 (1981); Fla. Stat. Ann. §63.172 (1985); Ga. Code Ann. §19-8-14 (1982); Hawaii Rev. Stat. §578-16 (1985); Idaho Code §16-1508 (1979); Ill. Rev. Stat. ch. 110½, §2-4 (1979); Ind. Code §29-1-6-1 (1976); Iowa Code Ann. §600.13 (1987); Kan. Stat. Ann. §59-2103 (1986); Ky. Rev. Stat. §199.520 (1982, Cum. Supp. 1986); Md. Fam. Law Code Ann. §5-308 (1984); Mass. Gen. Laws Ann. 210 §§6, 7, 8, (1958 Cum. Ann. Pkt. Pt. 1987); Mich. Comp. Laws Ann. §700.128 (1980); Minn. Stat. §259.29 (1980); Miss. Code Ann. §93-17-13 (1973); Mo. Rev. Stat. §453.090 (Vernon's 1986); Mont. Code. Ann. §40-8-125 (1985); Neb. Rev. Stat. §30-2309 (1974); Nev. Rev. Stat. Ann. §127.160 (1986); N. H. Rev. Stat. Ann. §170-B:20 (1955); N. J. Stat. Ann. §9:30-50 (1976, Cum. Ann. Pkt. Pt. 1987); N. M. Stat. Ann. §40-7-52 (1978, Repl. 1986); N. Y. Est. Powers & Trusts §2-1.3 (McKinney 1981); N. C. Gen.

provide for a standard of proof for the inclusion or exclusion of adopted children in dispositive instruments. For example, State statutes provide that such inclusion or exclusion "plainly", or "clearly", or "expressly", or "specifically" appear, and six States utilize a formula which approaches what we submit is the minimum standard required under the Fourteenth Amendment, namely, a reference to the adopted child by *name* or by some description *not* based on a parent and child or blood relationship.[9]

The standard of proof prescribed by the challenged Delaware rule offends the Fourteenth Amendment because it places a significant risk of error on innocent adopted stepchildren instead of placing *all* the risk of error upon the proponents of disinheritance. *Rivera* v. *Minnich*, ____ U.S. ____, Slip Op. June 25, 1987.

E. THE STATE'S ENFORCEMENT OF PROVISO (a) OFFENDS THE FOURTEENTH AMENDMENT

Enforcement by the Delaware Supreme Court of an invidious discrimination against adopted stepchildren—contrary to the mandate of Delaware's own adoption statute—does not pass constitutional muster. Section 919(a) of 13 *Del. C.* places an adopted child within his adoptive father's bloodline ("as if he had been born in wedlock to the adopting parent"). In Proviso (a) the scrivener used ambiguous language which does not unmistakably cover a *stepchild,* and substituted a contrary private definition of an

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Stat. §48-23 (1984); N. D. Cent. Code §14-15-14 (1981); Ohio Rev. Code Ann. §3107.15 (Baldwin 1987); Or. Rev. Stat. §112.175 (1979); Pa. Cons. Stat. Ann. §2107 (Purdon Cum. Ann. Pkt. Pt. 1987); R. I. Gen. Laws §15-7-16 (1981); S. C. Code Ann. §20-7-1770 (1976, Cum. Supp. 1986); Tenn. Code Ann. §36-1-126 (1984); Tex. Fam. Code Ann. §16.09 (Vernon 1986); Wash. Rev. Code Ann. §26.33.260 (1986); W. Va. Code §48-4-11 (1986 Repl. Vol.); Wis. Stat. §851.51 (1971).

9. Alaska, Arkansas, Connecticut, Florida, Georgia, and North Dakota.

adopted child for the Legislature's definition. A State cannot enforce such a private definition in face of its own statutory definition without doing violence to the due process clause.

The law firm which drew the indenture amendment is the same law firm which drew Section IV(2) of the indenture making 13 *Del. C.* §919(a) controlling as to meaning and validity of Proviso (a). (Pet. at 45a). Section 919(a) of 13 *Del. C.* does not provide for any rebuttable presumption; it unconditionally makes plaintiffs the "lawful blood descendants" of their adoptive stepfather.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 5, 1987